



COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

DONALD F. PARSONS, JR.  
VICE CHANCELLOR

New Castle County CourtHouse  
500 N. King Street, Suite 11400  
Wilmington, Delaware 19801-3734

Submitted: December 6, 2006  
Decided: December 15, 2006

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Re: *B.F. Rich Co., Inc. v. Richard E. Gray, Sr. and Rich Realty, Inc.*, Civil Action No. 1896-N

Dear Counsel and Mr. Gray:

Plaintiff, B.F. Rich Co., Inc. ("B.F. Rich"), has moved for a stay pending appeal of the Court's November 9, 2006 Memorandum Opinion ("Opinion")<sup>1</sup> permitting Richard Gray) ("Gray") to exercise written consents on behalf of his minor children, thereby allowing Gray to control the nominal defendant, Rich Realty, Inc. ("RRI"). B.F. Rich principally argues that absent a stay it will be denied effective appellate review in that its

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<sup>1</sup> *B.F. Rich Co. v. Gray*, 2006 WL 3337163 (Del. Ch. Nov. 9, 2006).

proprietary financial information will be released without restriction to Gray and Gray might take fundamental or extraordinary corporate action while his entitlement to serve as a director and officer of RRI is on appeal. Gray and RRI oppose a stay, arguing that B.F. Rich's appeal does not present substantial issues, that B.F. Rich has not shown that it would be irreparably harmed in the absence of a stay and that Gray's minor children and other allied stockholders of RRI, who collectively hold a majority of the company's stock, would be substantially harmed if a stay were granted. For the reasons stated in this letter opinion, the Court denies B.F. Rich's motion.

#### I. LEGAL STANDARD

A motion for a stay pending appeal is addressed to the discretion of the trial court.<sup>2</sup> In exercising its discretion, the Court considers four factors: 1) the appeal's likelihood of success on the merits; 2) whether the movant will suffer irreparable harm absent a stay; 3) whether any other interested party will suffer substantial harm if the Court grants the stay; and 4) whether the grant of the stay will harm the public interest.<sup>3</sup> No one factor is dispositive; rather, the Court will carefully weigh all relevant considerations.<sup>4</sup>

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<sup>2</sup> DEL. SUP. CT. R. 32(a); DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 14-9 at 14-17 (2005).

<sup>3</sup> *Tafeen v. Homestore, Inc.*, 2005 WL 1314782, at \*1 (Del. Ch. May 26, 2005) (citing *Kirpat, Inc. v. Del. Alcoholic Beverage Comm'n*, 741 A.2d 356, 357-58 (Del. 1998)).

<sup>4</sup> Wolfe & Pittenger § 14-9 at 14-18 (citing cases).

## II. ANALYSIS

### A. Likelihood of Success on the Merits

When considering the appeal’s likelihood of success on the merits, this Court “is called upon not to second guess its decision, but to assess, as objectively as possible, whether the case presents a fair ground for litigation and more deliberative investigation.”<sup>5</sup> The Delaware Supreme Court in *Kirpat*<sup>6</sup> noted that the likelihood of success factor is only one of four relevant considerations and that it is important to “balance all of the equities involved in the case together.”<sup>7</sup> The Court continued:

If the other three factors strongly favor interim relief, then a court may exercise its discretion to reach an equitable resolution by granting a stay if the petitioner has presented a serious legal question that raises a “fair ground for litigation and thus for more deliberative investigation.”<sup>8</sup>

B.F. Rich contends that its appeal raises substantial and novel issues. It identifies those issues as: “(1) whether a shareholder of a Delaware corporation has standing to challenge the assignment of the right to exercise the controlling stock interests in a Delaware corporation; and (2) whether the assignment of the stock rights was legally and validly made.”<sup>9</sup> As explained in the Opinion, the Court does not believe that the

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<sup>5</sup> *Id.* (internal quotation omitted) (citing cases).

<sup>6</sup> *Kirpat v. Del. Alcoholic Beverage Control Commission*, 741 A.2d 356, 358 (Del. 1998).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Pl.’s Mot. to Stay Pending Appeal at 2.

challenged Stipulation approved by the Connecticut Superior Court effected any “assignment” of stock rights; rather, it reflected the ability of a father (Gray) to exercise the stock voting rights of his minor children and the agreement of the children’s mother not to interfere with the exercise of those rights. Similarly, the standing issue presented is much narrower than B.F. Rich’s characterization of it suggests.<sup>10</sup> Nor does this Court’s ruling on standing run contrary to existing authority, as B.F. Rich suggests. Thus, based on the reasoning set forth in the Opinion, I do not believe the appeal is likely to succeed on the merits.

Nevertheless, the factual circumstances of this case are unusual and little directly applicable precedent exists. B.F. Rich, therefore, arguably can present a legal issue that would raise a fair ground for litigation and for more deliberative investigation. Consequently, if the other factors relevant to determining a motion to stay pending appeal, on balance, strongly favored interim relief, a stay might be in order. I therefore turn to those other factors.

### **B. Irreparable Harm to B.F. Rich**

B.F. Rich identified only two types of action by Gray that allegedly would cause it irreparable harm. First, it contends that, absent a stay, proprietary financial information

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<sup>10</sup> B.F. Rich also argues that the issues on appeal are novel because they involve the law of a foreign jurisdiction. *Id.* at 2-3. That argument is weak. “Delaware courts often decide legal issues – even unsettled ones – under the law of other jurisdictions.” *Berger v. Intelident Solutions, Inc.*, 906 A.d 134, 137 (Del. 2006) (citing *Taylor v. LSI Logic Corp.*, 689 A.2d 1196 (Del. 1997) and *Kolber v. Holyoke Shares, Inc.*, 213 A.2d 444 (Del. 1965)).

of B.F. Rich will be released without restriction into the hands of Gray. During this litigation, the Court entered a Stipulation and Order Governing the Protection of Confidential Information (“Protective Order”) that presumably covers any proprietary financial information produced by B.F. Rich. Under paragraph 3 of the Order, “Confidential Material may not be used or disclosed to Gray in his individual capacity or to any entities now or formerly controlled by Gray, but may be used or disclosed to Gray as the proxy for his minor children in their capacities as stockholders of RRI.” The Protective Order, however, further provides that:

The obligations of the parties under this Stipulation will terminate if and when [this Court] rules that Gray has been elected an officer and director of RRI as part of the above captioned action or upon such further order of the Court as may apply. In such event and thereafter, RRI and Gray shall be free to use the Confidential Material for any legal purpose subject only to the restrictions within the Lease, if any.<sup>11</sup>

I consider the safeguards in the Protective Order sufficient to protect against the harm B.F. Rich fears, provided the Order remains in effect. Therefore, in response to B.F. Rich’s motion to stay, I will require that, notwithstanding the provisions regarding termination quoted above, the Protective Order continue in effect until at least the pending appeal has been resolved. Subject to that requirement, I find that B.F. Rich has not shown that it will suffer irreparable harm from disclosure or use of proprietary financial information, unless a stay is granted.

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<sup>11</sup> Protective Order ¶ 12.

The only other potentially irreparable harm cited by B.F. Rich is a concern that Gray might exercise the power of the majority shareholders he acts for in a draconian way, such as by effecting a freeze-out merger to eliminate B.F. Rich's minority interest.<sup>12</sup> In his opposition to the motion to stay and again at the argument held on December 6, 2006, however, Gray expressly assured the Court that he would not consummate such a merger or take any other draconian action relating to RRI before the resolution of B.F. Rich's appeal.<sup>13</sup> I understand Gray's undertaking to include, for example, refraining from any effort to evict B.F. Rich as a tenant from the building owned by RRI, to sell or transfer the ownership of that building or to take any other fundamental, extraordinary or irreversible corporate action on behalf of RRI during the pendency of the appeal. Based on Gray's undertaking, I conclude that B.F. Rich has not shown that it faces a threat of irreparable harm from any action that RRI, under Gray's leadership, is reasonably likely to take while the appeal is pending.

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<sup>12</sup> B.F. Rich based this argument on a comment Gray allegedly made during a discussion with B.F. Rich's counsel of certain issues flowing from the Opinion and possible settlement approaches. Mot. To Stay Appeal ¶ 6 & n.2. Gray objects to the use of what he describes as an "off-hand statement" under Delaware Rule of Evidence 408, but it is not necessary to resolve that objection for purposes of this decision.

<sup>13</sup> Objection of Pro Se Def. Richard E. Gray, Sr. to Mot. by B.F. Rich to Stay Pending Appeal (Gray's Opp'n) at 1 n.2.

**C. Substantial Harm to Gray's Children Who Collectively Own a Majority of RRI's Stock**

In the Opinion, this Court held that Gray has the authority to exercise the voting rights of his minor children, who own 49.5% of the stock of RRI. Gray together with other stockholders, including Gray's adult daughter, Carson Gray, executed written consents appointing Gray and others as directors of RRI. Up until that time, there had not been a shareholder meeting or vote in the seven year history of RRI. Rather, B.F. Rich, a 15% shareholder and tenant in the building owned by RRI, has controlled the company. Before this litigation, the officers of RRI and B.F. Rich were identical. According to Gray, a stay would substantially harm his minor children and the RRI stockholders aligned with them, because he and the other newly elected directors and officers will not be able to start the process necessary to create value for all stockholders, determine whether the leased property has been properly maintained and obtain information from B.F. Rich and others necessary to administer the affairs of RRI relating to an outstanding industrial revenue bond, taxes, valuations and other matters. Gray and the nominal defendant, RRI, also contend that B.F. Rich has denied them access to basic information about the operation of RRI, such as the meaning of an item on RRI's balance sheet showing \$200,000 of deferred rent.

During the course of the litigation, the parties have operated under an informal status quo agreement, but they never reduced it to writing or obtained a formal status quo order. Gray and those aligned with him apparently have exercised a limited level of

control over RRI.<sup>14</sup> Even though RRI is simply a landlord, however, it does not appear that its operations have been transparent to the stockholders represented by Gray. Against that background, I am persuaded that Gray's minor children and the stockholders who joined with them in the written consents to change the directors of RRI do face a risk of substantial harm, if a stay pending appeal is ordered, because it would further frustrate their rights as shareholders.

#### **D. Potential Harm to the Public Interest**

None of the parties has presented a persuasive argument that the grant or denial of a stay will harm the public interest. Thus, this factor does not favor one side or the other in the requisite balancing of the equities.

#### **E. Balancing of the Relevant Factors**

Based on the conclusions I reached on likelihood of success on appeal, irreparable harm to B.F. Rich, likely harm to Gray's children, and potential harm to the public interest, I find that the balance of the equities here does not warrant a stay during the appeal. I do not believe that the appeal is likely to succeed on the merits. Although the appeal may raise a fair ground for litigation and more deliberative investigation, the other three factors do not favor interim relief. On one hand, B.F. Rich has not shown a threat of irreparable harm. On the other hand, I have determined that Gray's children, as stockholders of the corporation, do face a risk of substantial harm. The public interest

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<sup>14</sup> See letter of Henry A. Heiman to Court, dated December 8, 2006, and attachments.

factor is neutral. Granting a stay would continue to prevent a majority of the shareholders from effectively exercising their rights, as well as further delay administrative matters of RRI. The counterveiling risk of harm to B.F. Rich appears slim, particularly upon continuance of the Protective Order and in view of Gray's personal assurances to the Court. Therefore, upon careful review, I find that the balance favors denial of stay, subject to an extension of the obligations of Gray and RRI under the Protective Order during the appeal.<sup>15</sup>

### III. CONCLUSION

For the reasons stated, the Court denies B.F. Rich's motion for a stay pending appeal; provided, however, that the Protective Order is hereby amended by substituting the following for the current language of paragraph 12 of that Order: "The obligations of the parties under this Stipulation shall remain in full force and effect until the pending appeal is resolved or further order of this Court."

**IT IS SO ORDERED.**

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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<sup>15</sup> Accordingly, the issue of the amount and type of bond or other security need not be addressed.