STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0630

Gerry Fisher,
Appellant,

v.

Larry Jeddeloh, et al.,
Respondents,

Thomas Lehn,
Respondent,

Paul Larson,
Respondent,

Alebra Technologies, Inc.,
Respondent.

Filed April 8, 2008
Affirmed
Poritsky, Judge*

Hennepin County District Court
File No. 27-CV-06-13967

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Considered and decided by Kalitowski, Presiding Judge; Connolly, Judge; and Poritsky, Judge .

U N P U B L I S H E D   O P I N I O N

PORITSKY, Judge

Gerry Fisher was removed as Alebra Technologies, Inc.'s CEO shortly after a contested shareholders' vote elected a new board of directors. His suit challenging aspects of this vote was dismissed by the district court for failure to state a claim upon which relief can be granted. We affirm.

FACTS

Appellant Gerry Fisher, a former CEO of respondent Alebra Technologies, Inc., brought a ten-count complaint in district court seeking equitable relief and damages. The district court granted respondents' motion to dismiss under Minn. R. Civ. P 12.02(e) for failure to state a claim upon which relief can be granted and dismissed counts I through IX of appellant's complaint with prejudice. Count X was not addressed by the district court because the parties agreed to resolve the issue at a later time and is not at issue in this appeal.

Alebra, a Minnesota corporation, entered into restricted stock award agreements ("award agreements" or "agreements") with selected employees ("the restricted shareholders") on December 31, 2005. Under the terms of the award agreements, each selected employee received restricted shares that did not fully vest until December 31, 2010. The award agreements also provided Alebra's CEO and CFO with proxy voting rights until the shares fully vested. When these agreements were entered into, Alebra had only two officers, with appellant serving as CEO and respondent Thomas Lehn serving as CFO. Appellant and Lehn also served as the only members of Alebra's board of directors.

At some point, appellant had a falling out with Lehn. This dispute came to a head in May 2006. On May 9, respondent TIS Group, Inc. (TIS), an institutional investor holding about 7% of Alebra's outstanding shares, sent Alebra a letter demanding a shareholder meeting and nominating Lehn and respondent Paul Larson as candidates for the board of directors. Seven days later, on May 16, appellant attempted to fire Lehn without board approval. Lehn rejected the attempted termination by appellant as unauthorized and continued on in his role as CFO.

On July 10, 2006, Alebra's shareholder meeting was held. The primary order of business was the election of a new board of directors. There were two competing slates. One slate consisted of appellant and Rick Brimacomb, founder and president of Brimacomb LLC, a strategic and financial advisory firm, the other slate consisting of Lehn and Larson. Until that point, Larson had had no prior affiliation with Alebra. At the time of the meeting, Alebra had 5,251,992 shares outstanding. This included all

1,048,362 restricted shares that were issued pursuant to the award agreement. At the meeting, Lehn's slate received 2,249,903 votes, while appellant's slate received only 1,899,947. Both appellant and Lehn had attempted to vote the restricted shares in their favor, but because they could not agree on a slate, the election inspector determined pursuant to Minnesota law that the restricted shares would not count toward the final vote. Minn. Stat. §302A.449, subd. 5(b) (2004) (explaining that split proxies shall not be counted). Prior to this meeting, every restricted shareholder except Lehn provided appellant with a new "proxy" authorizing him to vote the restricted shares for his slate. Had these shares been voted in appellant's favor, his slate would have won.

Following the election, appellant was removed as Alebra's CEO. He then commenced the present action, claiming: (I) equitable relief due to board of directors deadlock; (II) breach of fiduciary duty by Lehn; (III) aiding and abetting a breach of fiduciary duty by respondents Larry Jeddeloh, TIS, and Larson; (IV) violations of Minn. Stat. § 302A.751 (2004) by respondents; (V) breach of duty of good faith by Lehn; (VI) interference with contract by Lehn, Jeddeloh, Larson, and TIS; (VII) breach of contract by Lehn; (VIII) breach of contract by Alebra; (IX) declaratory and equitable relief grounded on a claim that the election inspector improperly disenfranchised the restricted shareholders; and (X) indemnification.

This complaint was ultimately dismissed by the district court for failure to state a claim upon which relief can be granted. Although appellant challenges the district court's order on a number of grounds, there are two issues that are central to this appeal: (1) whether a CEO has the authority to terminate a CFO without board approval, and

(2) whether a proxy holder has a fiduciary duty to vote shares in a restricted shareholder's interest. The resolution of these two issues will, in our view, determine the resolution of the remaining issues.

D E C I S I O N

I. Alebra's CEO does not have the authority to terminate the CFO without board approval.

Appellant mistakenly argues that the Minnesota Business Corporation Act (MCBA) and Alebra's bylaws granted him the authority to fire Lehn without obtaining approval from the board of directors. The MCBA explicitly vests in the board the authority to remove an officer: "An officer may be removed at any time, with or without cause, by a resolution approved by the affirmative vote of a majority of the directors present, subject to the provisions of a shareholder control agreement." Minn. Stat. § 302A.341, subd. 2 (2004). Section 4.13 of Alebra's bylaws is consistent with the MCBA on this topic: "Subject to the provisions of any shareholder control agreement, an officer may be removed at any time, with or without cause, by a resolution approved by the affirmative vote of a majority of the directors present at a duly called meeting of the Board of Directors." Read together, it is clear that Alebra's board has the authority to remove an officer. There is no similar grant of authority giving a CEO the power to terminate an officer.

Instead, appellant points to the broad grants of authority given to a CEO by the MBCA and Alebra's bylaws and argues that these provide a CEO with the authority to remove a CFO without board approval. *See* Minn. Stat. § 302A.305, subd. 2 (2004) (listing one of the CEO's roles as the "general active management of the business of the corporation"); Alebra Bylaws § 4.04 ("The chief executive officer shall have responsibility for the active management of the business of the corporation and shall see that all orders and resolutions of the Board of Directors are carried into effect."). Appellant's reliance on these broad grants of authority is misplaced. The MCBA requires that Minnesota corporations have both a CEO and a CFO. Minn. Stat. § 302A.301 (2004). In our opinion, the removal of a CFO—a statutorily required corporate officer—is outside the scope of the general active management of the business. It is inappropriate to use a general grant of authority, intended to give a CEO the ability to manage daily corporate affairs, as the basis for terminating a CFO. Appellant urges us to hold that this broad language gives a CEO the power to terminate a CFO, but we decline to do so. It is not our duty to find ambiguity where none exists, and we find nothing in the language of the MCBA or Alebra's bylaws which suggests that a CEO has the authority to terminate a CFO without board approval. Minn. Stat. § 645.16 (2004) ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

Additionally, because the MBCA uses explicit language to allow for an officer's removal by the board, we can infer from the legislature's failure to use similar language in describing a CEO's authority that it did not intend for a CEO to have the ability to remove a CFO. "In so doing, we abide by the canon of statutory construction 'expressio unius exclusio alterius,' meaning the expression of one thing is the exclusion of another." *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 457 (Minn. 2006).

Finally, appellant cites to the Delaware case *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006), as holding that a CEO has the power to remove inferior officers without prior board approval. However, we find that the *Disney* case is not controlling. At the outset, it should be noted that cases from the Delaware Chancery Court, while persuasive, are not binding on this court. Moreover, there are at least two important ways in which *Disney* is distinguishable from the present case. First, Delaware law, unlike Minnesota law, does not require that a corporation have officers, while Minnesota requires that corporations have at least a CEO and CFO. *Compare* Del. Code Ann. tit. 8, § 142 (2001) *with* Minn. Stat. § 302A.301. Second, Disney's corporate bylaws explicitly provide its Chairman/CEO with the authority, subject to some board control, to manage and direct the other corporate officers. *Disney*, 907 A.2d at 773-75 (quoting Disney's bylaws). A similar grant of authority is completely absent in Alebra's bylaws. Because of the significant differences between *Disney* and the present case, we find *Disney* is wide of the mark in deciding the present case.

Appellant argues that he had the authority to terminate Alebra's CFO without board approval, but fails to cite any statutes, cases, or sections of Alebra's bylaws that directly support this position. As a result, we conclude that, as a matter of law, appellant did not have the authority to terminate Lehn from his position as CFO.

II. A proxy holder does not have a fiduciary duty to vote shares in a restricted shareholder's interest.

Appellant further urges us to conclude that the proxy holders were under a fiduciary duty to vote the restricted shares in the shareholders' best interests, but we decline to do so. The relevant portion of the award agreement, which grants the proxy holders their proxy, provides:

> Rights and Restrictions as a Shareholder. During the Employee's continued full time employment with the Company or its subsidiaries Employee shall have full voting rights, dividend rights and other rights as a shareholder with respect to all vested (but not unvested) Award Shares. So long as the Company retains custody of the certificates for the Award Shares, Employee shall not (i) sell, offer to sell, transfer, pledge or hypothecate any record or beneficial interest in the Award Shares, other than to the Company as provided in this Agreement or (ii) grant any proxies or voting rights with respect to the Award Shares, except to the Company. The Employee hereby grants an irrevocable proxy to the chief executive officer and the chief financial officer of the Company (the act of one of them being sufficient), which is coupled with an interest as described in Minnesota Statutes § 302.449, *to vote all unvested Award Shares, in the sole discretion of such officer* (subject to direction by the Board of Directors of the Company) *on any and all matters put to a vote of the shareholders of the Company*. Upon vesting of the Award Shares pursuant to Section 2 above, Employee (or the person or persons then entitled to the Award Shares or any portion thereof pursuant to Section 2(d) above) shall have full voting rights, dividend rights and other rights as a shareholder with respect to such Award Shares.

(Emphasis added.)

We find that this agreement's language is clear and unambiguous. On its face, it creates no duty for the proxy holders to vote in the restricted shareholders' best interests. Instead, it gives Alebra's CEO and CFO the authority to vote all unvested shares in their sole discretion. There are no qualifications, restrictions, or restraints. The agreement itself gives Alebra's CEO and CFO unfettered authority to vote the shares as they see fit. We note that appellant played an active role in the creation of the proxy and even signed the proxies on Alebra's behalf, and thus he cannot now be heard to complain about their content. Additionally, the statute governing proxy liability anticipates that parties to a proxy will create contractual duties if they want additional protection when it specifies that specific restrictions are necessary to limit the authority granted in a proxy appointment. Minn. Stat. § 302A.449, subd. 6 (2004) ("Unless the appointment of a proxy contains a restriction, limitation, or specific reservation of authority . . . ."). While the restricted shareholders—including appellant—had this option at the time the award agreements were signed, they chose not to exercise it. Thus, in order for a duty to exist in this case, this court must discern whether under Minnesota law proxy holders owe restricted shareholders a fiduciary duty to vote restricted shares in their best interest. We hold they do not.

Our review of Minnesota statutes and cases has not uncovered any authority which directly supports the contention that proxy holders owe fiduciary duties to restricted shareholders. This alone is enough to prevent us from extending a duty in this case. *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."). If any duty does exist under Minnesota law, it is the corporate officers' duty to vote the restricted shares in the corporation's best interests. Minn. Stat. § 302A.361 (2004) ("An officer shall discharge the duties of an office in good faith, in a manner the officer reasonably believes to be in the best interests of the corporation . . . .").

Appellant cites *Miller Waste Mills, Inc. v. MacKay*, 520 N.W.2d 490 (Minn. App. 1994), *review denied* (Minn. Oct. 14, 1994), for the proposition that proxy holders must vote restricted shares in the restricted shareholders' best interests. We do not find this case persuasive. *Miller Waste* did not deal with a proxy vote. Instead, it dealt with a situation in which the legal owners of shares attempted to vote the shares contrary to the equitable interests of a corporation after the corporation exercised a repurchase option, but before the purchase closed. *Miller Waste*, 520 N.W.2d at 495 ("When a corporation exercises a valid contractual repurchase option . . . the corporation becomes the equitable owner of the stock, and the shares can not then be voted contrary to the equitable owner's interests."). In the present case, the restricted shareholders had each signed a proxy authorizing Alebra's CEO and CFO to vote the shares in their sole discretion. This grant of authority distinguishes the present case from *Miller Waste* and gives the proxy holders the ability to vote the restricted shares against the restricted shareholders' "interests."

For the reasons articulated above, we decline to create a fiduciary obligation on proxy holders to vote restricted shares in the restricted shareholders' best interests. To do otherwise in this situation would essentially eviscerate the award agreement that was actually entered into by the restricted shareholders. This agreement gives broad authority to Alebra's CEO and CFO to vote the shares in their sole discretion. To read fiduciary obligations into this agreement would have the effect reading out the discretion it explicitly gives to Alebra's officers.

III. Appellant's remaining claims.

The above two issues having been resolved, the resolution of the remaining issues follows as a matter of course.

Appellant argues that respondents acted in an unfairly prejudicial manner toward the restricted shareholders at the July 10, 2006, shareholder meeting by violating their reasonable expectations. We disagree. The MCBA states that any written agreements between a shareholder and the corporation "are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements." Minn. Stat. § 302A.751, subd. 3a (2004). In this case, there was a clear and unambiguous written agreement between the restricted shareholders and the corporation, which granted Alebra's CEO and CFO the authority to vote the restricted shares in their sole discretion. Alebra's officers exercised the authority that was granted to them and it was unreasonable for the restricted shareholders to expect the proxy holders to vote in their interest. On this issue, appellant relies on *Gunderson v. Alliance of Computer Prof'l's., Inc.*, 628 N.W.2d 173 (Minn. App. 2001), *review granted* (Minn. July 24, 2001) *and appeal dismissed* (Minn. Aug. 17, 2001). His reliance is misplaced. In *Gunderson*, we did say, as appellant notes, that written agreements are not dispositive of shareholder expectations, but we also iterated the rule that such agreements presumptively reflect shareholder expectations. *Id.* at 186. We further noted that "written agreements should . . . be honored to the extent they specifically state the terms of the parties' bargain." *Id.* And we went on to conclude that enforcing the agreement in that case reflected the reasonable expectation of the shareholder. *Id.* at 187. Here, appellant and all the other restricted shareholders signed proxies giving Alebra's CEO and CFO the unfettered ability to vote the restricted shares in their sole discretion. The proxies' language is clear and unambiguous. No rational factfinder could find that the proxy language created a duty to vote the shares in the restricted shareholders' best interests.

Appellant's claim that the board of directors was deadlocked was properly dismissed. A court may grant equitable relief when "the directors or the persons having the authority otherwise vested in the board are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock." Minn. Stat. § 302A.751, subd. 1(b)(1) (2004). This statute, by its very terms, does not apply to the present case. While the board may have been in deadlock leading up to the meeting, the shareholders were able to resolve this deadlock by electing a new slate of directors that were able to work with one another. The fact that the restricted shares were not voted at this meeting is not relevant for the purposes of Minn. Stat. § 302A.751, subd. 1(b)(1).

The district court properly dismissed appellant's claim that Lehn breached a duty of good faith under the award agreement. The agreement imposed no duty upon Lehn to act in the interests of the shareholders. When he voted the restricted shares in favor of his slate, he was acting well within the discretion granted to him by the language of the agreement. Thus, there was no breach of good faith by Lehn.

The district court properly dismissed appellant's claim that Jeddeloh, TIS, and Larson aided and abetted Lehn's breach of fiduciary duty. As we have demonstrated above, the award agreement did not impose any fiduciary duty upon Lehn to vote the restricted shares in the best interests of the shareholders. Thus, no liability can be imposed upon respondents for aiding and abetting violation of such duty.

The district court properly dismissed appellant's claims alleging interference with contract on the part of Lehn, Jeddeloh, TIS, and Larson. The award agreement clearly gave Lehn the right to vote the restricted shares in his discretion. The restricted shareholders had no legally recognizable expectation that Lehn would vote the shares in their interests. Therefore, respondents did not interfere with the award agreement by supporting the Lehn slate of directors.

The district court properly dismissed appellant's claim of breach of contract against Lehn. Lehn's actions at the July 10, 2006, shareholder meeting were authorized by the award agreement signed by the restricted shareholders giving him the power to vote the restricted shares in his sole discretion. Because Lehn properly exercised valid contractual rights by voting the restricted shares in favor of his slate, there is no valid claim for breach of contract against him.

The district court properly dismissed appellant's claim of breach of contract against Alebra. The award agreement was never breached because Alebra's CEO and CFO never acted outside the authority given to them by the agreement. The mere fact that the shares were not counted is not enough to breach the award agreement.

The district court properly dismissed appellant's request for declaratory judgment. In Minnesota, absent specific instructions, "[i]f the proxies are equally divided, the shares shall not be voted." Minn. Stat. § 302A.449, subd 5(b) (2004). In this case, appellant and Lehn pledged the restricted shares for opposing slates. In other words, the proxies were equally divided. Thus, the election inspector acted properly in disregarding their votes.

Finally, appellant contends that the district court improperly considered matters outside the pleadings and, as a result, that respondent's motion to dismiss should have been converted into a motion for summary judgment, and the parties should have been given adequate time for discovery and submission of supporting material. *See* Minn. R. Civ. P. 12.03 ("If, on such motion, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56 . . . ."). The district court did not err in granting respondents' motion to dismiss. If a document is referenced in a complaint, a district court may look at it when considering a motion to dismiss. *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 739 n.7 (Minn. 2000) (explaining that in a motion to dismiss under rule 12.02(e), reviewing court may consider particular documents and oral statements referenced in the complaint). In this case, we cannot find evidence that the district court considered any prohibited documents before granting its motion to dismiss. However, even if the district court did consider prohibited documents, and the motion to dismiss was converted to a motion for summary judgment, our holdings would remain unchanged. Appellant has not shown that he was precluded from raising any issue that he might have been able to raise in a motion for summary judgment. All the claims raised by appellant in his complaint are dependent on the two legal issues that we have addressed in earlier portions of this opinion.

Affirmed.