

BRENT D. REDSTONE

*

IN THE

Plaintiff,

*

CIRCUIT COURT FOR

v.

*

BALTIMORE CITY

NATIONAL AMUSEMENTS, Inc.

*

CASE NO. 24-C-06-001493

Defendant.

*

* * * * *

MEMORANDUM OPINION

Defendant National Amusements, Inc., (“NAI”) is a closely held Maryland Corporation based in Deadham, Massachusetts. NAI operates movie theaters and is the controlling shareholder of CBS Corporation, Viacom, Inc., and Midway Games, Inc. Sumner Redstone is Plaintiff Brent Redstone’s father and Chairman of the Boards of CBS, Viacom, and NAI. In 1972 he placed sixteen and two-thirds (16 2/3) shares of NAI’s voting stock in the BDR Trust for the benefit of Plaintiff.¹ Plaintiff was on Viacom’s Board of Directors from 1994 until 2003 when he alleges he was removed at the direction of his father. Plaintiff continues to sit on NAI’s Board of Directors but alleges that his position as a director has become nominal and that he has been threatened with removal because he has not always conceded to his father’s wishes and demands or voted the way his father desired. Plaintiff alleges that he is paid by Northeast Theatre Corporation, a theater management company that manages NAI’s theaters but does nothing to earn this income other than own NAI stock. Plaintiff alleges that he has been blocked in his efforts to find out about NAI’s relationship to Northeast Theatre and that his father has used Northeast Theatre to misappropriate money from NAI.

¹Plaintiff also owns 11 2/3 non-voting shares of NAI.

Plaintiff filed this lawsuit, pursuant to Md. Code Ann., Corp's & Ass'ns §3-413(b)(2), seeking NAI's dissolution alleging that he was improperly removed from Viacom's Board of Directors; frozen out of NAI; and that his father has engaged in self-dealing, usurped corporate opportunities and misappropriated corporate funds. NAI filed a motion to dismiss or, in the alternative for judicial decision under Md. Rule 2-502.² NAI argues that because Plaintiff received his shares as a gift, all his reasonable expectations have been met as a matter of law and thus he cannot seek dissolution of the corporation. Alternatively, NAI argues that the suit must be dismissed because by filing this lawsuit, Plaintiff triggered the terms of a Stock Repurchase Agreement which provides an effective means for Plaintiff to salvage his investment. Plaintiff filed an opposition and NAI filed a reply. At the hearing on the motion, Defendant presented the Court with a recent case not cited in its Memorandum or Reply. Plaintiff filed a Supplemental Memorandum responding to the new case, and Defendant filed a Response to the Supplemental Memorandum. For all of the reasons that follow, the Court will deny the motion.

In considering a motion to dismiss for failure to state a cause of action pursuant to Maryland Rule 2-322(b)(2), a trial court must assume the truth of all well-pleaded relevant

²Md. Rule 2-502 provides that:

If at any stage of an action a question arises that is within the sole province of the court to decide, whether or not the action is triable by a jury, and if it would be convenient to have the question decided before proceeding further, the court, on motion or on its own initiative, may order that the question be presented for decision in the manner the court deems expedient. In resolving the question, the court may accept facts stipulated by the parties, may find facts after receiving evidence, and may draw inferences from these facts. The proceedings and decisions of the court shall be on the record, and the decisions shall be reviewable upon appeal after entry of an appealable order or judgment.

and material facts in the complaint, as well as all inferences that reasonably can be drawn therefrom. *Stone v. Chicago Title Ins. Co.*, 330 Md. 329, 333 (1993). “When moving to dismiss, a defendant is asserting that, even if the allegations of the complaint are true, the plaintiff is not entitled to relief as a matter of law.” *Hrehorovich v. Harbor Hosp. Ctr.*, 93 Md.App. 772, 784 (1992). “Thus, in considering a motion to dismiss for failure to state a claim, the circuit court examines only the sufficiency of the pleading.” *Id.* “The complaint should not be dismissed unless it appears that no set of facts can be proven in support of the claim set forth therein.” *Bennett Heating & Air Conditioning, Inc. v. NationsBank*, 103 Md.App. 749, 757 (1995), *rev’d in part on other grounds*, 342 Md. 169 (1996).

The first question concerns the legal posture of the case and the nature of Defendant’s request. Defendant styled its paper as a “motion to dismiss. . . or, in the alternative for judicial decision under . . . Rule 2-502.” In considering a motion to dismiss, the Court’s inquiry is limited to the four corners of the complaint itself.

If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

Md. Rule 2-322(b). Attached to NAI’s Motion was a copy of the Stock Repurchase Agreement that NAI argues requires dismissal. Thus, if the Court considers the Stock Repurchase Agreement, the motion must be treated as a motion for summary judgment.

If the matter is resolved under Rule 2-502, the Court would need to set the matter for a hearing and allow both parties an opportunity to present evidence. *See Harris v.*

Stefanowicz Corp., 26 Md.App. 213, 218 (1975) (“Notwithstanding the hybrid development of Rule 502, it is as different from summary judgment in purpose and effect as is an apple from an orange.”) “Under [Rule 2-502], the court may isolate [an] . . . issue, take evidence on it, and make ultimate findings of fact with respect to it.” *Werbowsky v. Collomb*, 362 Md. 581, 621(2001). In contrast, “summary judgment . . . requires the court to view the facts and the inferences from them in the light most favorable to the party opposing the motion.” *Id.* at 622.

For the reasons stated below, the Court is going to deny the motion to dismiss and/or for summary judgment and deny the request for a Rule 2-502 hearing.

A GIFTED SHAREHOLDER IS NOT PRECLUDED FROM BRINGING AN ACTION FOR OPPRESSION.

Md. Code Ann., Corps. & Ass’ns §3-413(b) provides that “*Any* stockholder entitled to vote in the election of directors of a corporation may petition a court of equity to dissolve the corporation on grounds that . . . (2) The acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent.” (Emphasis added). Despite the fact that the statute provides that “any stockholder” may file a claim for oppression, NAI argues that “[s]ince Plaintiff received his shares as a gift, he cannot, as a matter of law or equity” prove oppression. Defendant’s Memorandum at 11.

Relying on *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md.App. 233 (2005), NAI argues that there is oppression “only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture”, and “there exists no effective means of salvaging the investment.” *Id.* at 258. Plaintiff argues that *Edenbaum* does not

establish any two part test; there is language in *Edenbaum* that makes clear that a case-by-case analysis is required to determine if there is oppression; there are no cases holding that a shareholder who received shares by a gift cannot as a matter of law make a claim of oppression; there are cases from other jurisdictions where a shareholder who received shares by a gift successfully brought an action for oppression; and the leading treatise makes clear that oppression cases must be decided on a case by case basis.

Defendant's argument fails. While the language that NAI cites is located in *Edenbaum*, a rigid two part test was not established. In *Edenbaum*, the issue was whether the trial court correctly found that there was no oppression because the majority shareholder had not acted illegally, fraudulently, in bad faith or committed any other wrongful act. Concluding that oppression is not synonymous with "illegal" or "fraudulent," the appellate court held that oppression is determined by whether a minority shareholder's "reasonable expectations are defeated". *Id.* at 255-60. The issue of whether the expectations of the dispossessed shareholder were reasonable was not before the Court.

What was before the Court was whether the defeat of the dispossessed shareholder's expectations, absent wrongdoing by the majority shareholder, was sufficient to prove oppression. The Court held that having her reasonable expectations defeated was sufficient for the minority shareholder to prove oppression. There was no argument made that the expectations of the dispossessed shareholder, i.e., "she would be employed by the corporation, receive a salary, and take part in management," were unreasonable or had not been defeated.³ *Id.* at 259. *See* Brief of Appellee/Cross-Appellant, WL 1112244, at p. 25;

³ In her Opposition, Appellee argued that her reasonable expectations had been defeated and that the court erred by refusing to dissolve the corporation. Brief of Appellee/Cross-Appellant, WL

Appellant’s Reply Brief, 2005 WL 1222754, at p. 10. Thus, the issue of whether a minority shareholder’s expectations are or are not reasonable was not before the Court. Most importantly, for our purposes, the dispossessed shareholder in *Edenbaum* had not acquired her shares by gift, thus the question of whether a shareholder who receives shares by a gift may bring an action for oppression was not before the Court.⁴

Defendant has not directed the Court to any cases that hold that as a matter of law that a shareholder who receives shares by a gift cannot bring an action for oppression. In contrast, Plaintiff has directed the Court to a body of cases where gifted shareholders have successfully maintained oppression suits. *See, e.g., Ford v. Ford*, 878 A.2d 894 (P.A. Super.

1112244, at p. 25. In his Reply, Appellant argued that Appellee’s “reasonable expectation argument blurs the distinction between Ms. Schwarcz’ ownership rights and her rights as a salaried employee. While Mr. Edenbaum had the right . . . to terminate [Appellee’s] employment . . . he has never attempted to terminate [her] ownership rights in any way.” Appellant’s Reply Brief, 2005 WL 1222754, at p. 10.

⁴Thus, the Court’s discussion of what is meant by “reasonable expectations” is dicta. Dicta does not mean that the language is unimportant or that litigants and lower courts may ignore it. Dicta simply means that the language was not central to the court’s holding and thus when the issue is before the court directly, the language may be refined and reshaped.

The term *dictum* is an abbreviated form of *obiter dictum*, which is translated as “a remark by the way.” It refers to a statement made by a court “incidentally or collaterally, and not directly upon the question before [it], or upon a point not necessarily involved in the determination of the cause” *Obiter dictum* lacks the authority of adjudication. It is not entitled to the precedential weight afforded the holding because it does not receive “the deliberate and considered judgment” used in phrasing the holding.

Halliday v. Sturm, Ruger & Co., Inc. 138 Md.App. 136, 160-161 (2001) (citations omitted) *aff’d on other grounds* 368 Md. 186 (2002). It is clear from reading *Edenbaum* that the precise “test” to be applied to determine if expectations are reasonable did not receive “the deliberate and considered judgment” of the Court.

Ct. 2005)(Court affirmed dissolution based on oppression, explicitly rejected argument that only minority shareholders in close corporations who either contribute capital or are officers may maintain claims for dissolution due to oppression); *Keating v. Keating*, 2003 WL 23213143 (Mass. Super. 2003)(Court held that close corporation's 49% gift shareholder had been frozen out, ordered corporation to buy back shares at fair market value); *Meiselman v. Meiselman*, 307 S.E.2d 551, 563 (N.C. 1983)(Minority shareholder acquired shares by gift filed suit for dissolution Court held that "a complaining shareholder's 'rights or interests' in a close corporation include the 'reasonable expectations' the complaining shareholder has in the corporation. These 'reasonable expectations' are to be ascertained by examining the entire history of the participants' relationship."); *Isaacs v. Am. Iron & Steel Co.*, 2006 WL 163498, *4 (Minn.App. 2006)(gifted shareholder filed suit for oppression, Court affirmed judgement finding oppression but reversed trial court on the issue of remedy.); *Coldwell v. Coldwell*, 2001 Mont. Dist. LEXIS 3572 (minority shareholder and shareholder who acquired shares by inheritance filed suit for oppression, Court applied reasonable expectations test holding that oppression had been shown but dissolution was not warranted); and *Bonavita v. Corbo*, 692 A.2d 119, 127-28 (N.J. Sup. Ct. Ch. Div. 1996)(plaintiff shareholder filed suit for oppression, died before trial, suit maintained by widow who inherited the shares; Court found oppression and ordered buyout at fair value).

Defendant also argues that the expectations of a shareholder who receives shares by a gift are different from (and lower than) those of someone who makes a financial investment to obtain the shares. *See, Mueller v. Cedar Shore Resort, Inc.*, 643 N.W.2d 56, 64 (S.D. 2002)(Where a shareholder received his shares by gift or inheritance, "the standard . . . requir[es] only 'decent' conduct by controlling shareholders." (Citing Robert W. Hamilton,

Business Organizations: Unincorporated Businesses and Closely Held Corporations § 8.25 n84 and *Gimpel v. Bolstein*, 125 Misc.2d 45, 53(1984) (Complaining gifted shareholder was required to demonstrate that the majority shareholders' conduct was inherently oppressive.)). To the extent that those cases hold that the determination of what expectations are reasonable is a fact-based determination, this Court agrees. See *Edenbaum*, 165 Md. App. at 258 (Oppression is determined by whether “objectively viewed” the expectations that were defeated were both “reasonable under the circumstances and . . . central to the petitioner's decision to join the venture.”). Assuming, without deciding, that the standard articulated in *Mueller* and *Gimpel* is the Maryland standard for gifted shareholders, Plaintiff has pleaded sufficient facts to defeat a motion to dismiss.

THE STOCK REPURCHASE AGREEMENT HAS NOT BEEN TRIGGERED.

NAI argues that any reasonable expectations that Plaintiff may have are satisfied because Plaintiff could have no reasonable expectation that he could receive any price for his shares above the price in the Stock Repurchase Agreement and furthermore that the filing of this lawsuit triggered the terms of that agreement. This Court disagrees.

NAI relies upon *Doniger v. Rye Psychiatric Hosp. Center*, 505 N.Y.S.2d 920 (N.Y. App. Div. 1986) and *Johnsen v. ACP Distribution, Inc.*, 814 N.Y.S.2d 142 (N.Y. App. Div. 2006) as support for its claim that the Stock Repurchase Agreement was triggered when this suit was filed. Plaintiff points out that in *Johnsen* and *Doniger*, the claim was for deadlock, not oppression. NAI counters that this is a “distinction without a difference,” and points to the *Johnsen* Court’s statement that *Pace*, which did involve a claim of oppression, “state[d] in dicta that the . . . outcome[] would be the same as *Doniger* if the language in the

stockholders' agreement was equivalent to that in *Doniger*.” (see *Pace Photographers*, 71 N.Y.S.2d at 747,...). *Johnsen*, 814 N.Y.S.2d at 146.

NAI quotes the dicta in *Johnsen* correctly but the Johnsen's Court statement about the dicta in *In re Pace Photographers, LTD*, 71 N.Y.S.2d, 737 (1988) is inaccurate. The only citation in *Pace* to *Doniger* is the following:

As an abstract matter, it may well be that shareholders can agree in advance that an 1104-a dissolution proceeding will be deemed a voluntary offer to sell, or fix ““fair value”” in the event of judicial dissolution, and that their agreement would be enforced (see, *Matter of Doniger v. Rye Psychiatric Hosp. Center*, 122 A.D.2d 873, 877, 505 N.Y.S.2d 920, lv. denied 68 N.Y.2d 611, 510 N.Y.S.2d 1025, 502 N.E.2d 1007).

Pace, 71 N.Y.S. 2d at 747. This is clearly *not* a statement that the result in *Pace* would have been the same if the language was the same as the language in *Doniger*. In fact the *Pace* Court went on to note that “in the absence of explicit agreement a shareholders' agreement fixing the terms of a sale voluntarily sought and desired by a shareholder does not equally control when the sale is the result of claimed majority oppression or other wrongdoing-in effect, a forced buyout.” *Id.* (Citations omitted).

Furthermore, the issue in *Pace* was not whether the shareholder agreement had been triggered by the filing of the suit claiming oppression but whether the value of the shares would be determined under the agreement or under the statutory provision for determining fair value. That is because in *Pace*, the plaintiff had sued claiming oppression and the defendant had opted under New York's statute to purchase the shares at fair value. The New York statute states:

In any proceeding brought pursuant to [the section providing for an action for dissolution], any other shareholder or shareholders or the corporation may, at any time within ninety days after the

filing of such petition or at such later time as the court in its discretion may allow, elect to purchase the shares owned by the petitioners at their fair value and upon such terms and conditions as may be approved by the court. . . .

McKinney's Business Corporation Law § 1118(a). The defendant had also counterclaimed that the plaintiff was the wrongdoer. Defendant's invocation of § 1118 stayed the petition to dissolve the corporation, thus the issue of oppression or wrongdoing was not decided and the only question was how value would be determined under § 1118(b), which states:

If one or more shareholders or the corporation elect to purchase the shares owned by the petitioner but are unable to agree with the petitioner upon the fair value of such shares, the court . . . may stay the proceedings . . . and determine the fair value of the petitioner's shares

The Court held that on remand while a court might consider the terms of the shareholder's agreement in determining value, “[i]n th[e] forced sale” the value “may be very different from the objective of a shareholders' agreement fixing value for a voluntary sale.” *Pace*, 71 N.Y.S.2d at 748.

This is consistent with decisions from other courts holding that a stock repurchase agreement is not necessarily triggered or determinative of the value of the stocks when there is a suit alleging oppression. *See, e.g., Anderson v. Clemens Mobile Homes, Inc.*, 333 N.W.2d 900, 903-04 (Neb. 1983) (“Although one generally may not seek an involuntary dissolution of a corporation to avoid the consequences of a buy-sell agreement, the evidence here establishes that Anderson was forced out of the corporation by Clemens' failure to consider Anderson's interests . . . ,” thus the buy-sell agreement was not controlling.). In *Baylor v. Beverly Book Co., Inc.*, 216 S.E.2d 18 (1975) the appellate court concluded that the

trial court had erred in concluding that a suit for oppression had triggered a by-law provision on selling shares:

the trial court erred in holding that the allegation in Baylor's bill brought him within the ambit of the by-law provision requiring a stockholder desiring to sell his shares to offer those shares to the corporation or Dixon at their par value. Baylor, by his suit, did not offer to sell his shares of stock, but sought the relief which the law provides for stockholders whose rights are violated by oppressive conduct on the part of the officers and directors of a corporation or by their misapplication or waste of corporate assets.

Id. at 19.

Finally, the leading treatise suggests that in the absence of a statute

courts should not hold that a shareholders' agreement overrides the shareholders' statutory rights to seek involuntary dissolution, a buyout, or other remedy for majority shareholder misconduct, unless the agreement contains a specific provision on this point which the shareholders have knowingly accepted.

F. Hodge O'Neal and Robert B. Thompson, *Oppression of Minority Shareholders and LLC Members* § 7:25 at 7-170. The reason is that a general agreement to transfer stock is usually not done in anticipation of oppression.

A general, purportedly all-inclusive agreement regulating transfer of a corporations's stock may well not have been intended to apply in dissolution proceedings . . . for oppression of minority shareholders.

Id. (Citing *Pace*).

A RULE 2-502 HEARING IS NOT APPROPRIATE.

This Court cannot decide the remedy in this case before determining whether there was a wrong, i.e. oppression. New York's law would grant NAI an opportunity to purchase Plaintiff's shares at their fair value and/or at the value in the Stock Repurchase Agreement,

see McKinney’s Business Corporation Law §1118(a), however Maryland law has no similar provision. *See* Md. Code Ann., Corp’s & Ass’ns., §3-413. Although the Court would need to consider alternative remedies if oppression is proven,⁵ unless the Defendant is prepared to admit oppression, a Rule 2-502 hearing to determine the remedy is not appropriate before there has been a finding of oppression.

CONCLUSION

For all of the reasons stated, the motion will be Denied.

Dated: August 7, 2006

Judge Evelyn Omega Cannon

⁵As the Court of Appeals has stated, “the demise of a corporation is . . . an extraordinary action under [Md. Code Ann., Corp’s & Ass’ns., §3-413].” *Edenbaum*, 165 Md.App. at 259 (citing *Renbaum v. Custom Holding, Inc.*, 386 Md. 28, 48-49 (2005)). In *Edenbaum*, the Court noted that although Md. Code Ann. Corp’s & Ass’ns §3-413 only mentions dissolution as a remedy for oppression, “ alternative equitable remedies not specifically stated in the statute” are available to a court in fashioning a remedy. *Id.* at 260 (citation and internal quotations omitted). In *Edenbaum*, the Court remanded the case for consideration of remedies other than dissolution.

NAI’s fair market value exceeds \$8 billion. NAI and its affiliates employ more than 5000 people; it is the nation’s fifth largest operator of movie theaters and it is the controlling shareholder of two corporations, CBS and Viacom, which collectively employ approximately 42,000 people. Thus a decision to dissolve it would not be made lightly.