

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

FORRESTER CONSTRUCTION COMPANY, :
 :
 Plaintiff, :
 : Case No. 486728-V
 v. : (Consolidated with Case No. 486737-V)
 :
 DOUGLAS SCOTT FORRESTER, et al., :
 :
 Defendants. :

Attorneys and Law Firms:

James R. Newland, Esq, Leon Rodriguez, Esq. and Daphne Morduchowitz, Esq.
Seyfarth Shaw LLP, *Attorneys for Plaintiff Forrester Construction Company*

S. Scott Morrison, Esq., Corey S. Peterson, Esq. and Joseph F. Fiorill, Esq.
Katten Muchin Rosenman LLP, *Attorneys for Defendant David Stephen Forrester*

Mark A. Gilday Esq. and Kevin G. Barker, Esq.
Bregman, Berbert, Schwartz & Gilday, LLC, and Mark A. Klapow, Esq.
Crowell & Moring LLP, *Attorneys for Defendant Douglas Scott Forrester*

MEMORANDUM OPINION AND
PRELIMINARY INJUNCTION

On October 26, October 27, October 28, 2021, and November 1, 2021, the parties appeared for an evidentiary hearing on the motion of plaintiff Forrester Construction Company (“the company”) for a preliminary injunction seeking, among other things, the appointment of a third director. The motion was joined by defendant David Stephen Forrester (“David”). It was opposed by defendant Douglas Scott Forrester (“Scott”). Both David and Scott are named as defendants in the company’s complaint, which was filed on August 10, 2021. Time permits only a brief statement of the reasons for the court’s decision, consistent with Md. Rule 15-502(e).

The company currently has two stockholders, and is wholly owned by two brothers, David and Scott. There is a dispute between them as to whether they each own 50% of the outstanding stock, or, whether Scott has a controlling voting in trust by reason of David having transferred some of his stock to a trust which, if it occurred, may have stripped those shares of voting rights. That issue is not currently before the court, although it will need to be resolved at some point.

David and Scott have served as the sole two directors since the death of their brother, Rick Forrester, in August of 2014. The company has elected Subchapter S status under the Internal Revenue Code. This election generally requires identical stockholder distributions.

The company provides construction management, preconstruction, and design-build services throughout the Baltimore-Washington metropolitan areas. It was started by Rick in 1988. Scott joined some two years later. David joined in 1996. The company's big break came when it was hired to build 50 stores for Starbucks in the Washington, D.C. metropolitan area.

Currently, the company employs some 91 individuals, has total assets in excess of \$56 million, gross revenues in excess of \$28 million and substantial stockholder equity. Unfortunately, its bonding program was suspended by Zurich American Insurance Company ("Zurich") in May 2021 on account of "unauthorized" stockholder distributions by Scott and continuing stockholder discord between both stockholders. The material consequences of this suspension are at least two-fold. First, the company cannot bid on any public, and some private company, contracts. Second, the loss of bonding has caused certain private owners to request payment and performance bonds on projects that, in the past, they would not have asked for such protections.

At issue at this juncture is the circumstance of deadlock and dysfunction of the directors, which has not held a board meeting of its board of directors since August 31, 2017. The company has not had a stockholder meeting since August 2017, as well. The court has been asked to intervene in the management and operation of the company. According to the testimony of Wayne Cabot (“Cabot”), currently the company’s only officer, the company has lost business opportunities, suffered layoffs and resignations and may well suffer serious financial consequences in the next thirty days absent court intervention.

In its complaint, the company seeks the appointment of a third director and a declaration that Scott has taken corporate funds as stockholder distributions (at least \$2.47 million) without authority from the board of directors, that no stockholder may take distributions without prior board authorization, and that the company’s board is deadlocked on material issues within their exclusive control. The company avers that, without judicial intervention, it will incur material harm, including the inability to secure bid, payment and performance bonds for its construction projects. Count I pleads a common law breach of fiduciary duty claim against Scott.¹ Count II pleads a claim under Section 2.405.1 of the Corporations and Associations Article for breach of statutorily imposed duties of a director. Count III purports to plead a claim for gross negligence against Scott. Count IV seeks injunctive relief on account of directorial deadlock.

Scott sued the company and Cabot on August 10, 2021. Scott seeks a plethora of relief, including the appointment of an equitable receiver (count I) and an accounting (count II). Scott also seeks damages against David and Cabot for fraud and negligent misrepresentation (counts III, IV and V).

¹ See *Plank v. Cherneski*, 469 Md. 548, 625-26 (2020)(recognizing an independent cause of action for breach of fiduciary duty).

Scott opposed the company's motion, arguing that no Maryland court ever has appointed a "tie-breaking" director, and that appointing a third director by judicial fiat violates the by-laws, which outline the procedures for the appointment of a director. Scott argues, as well, that such a result would strip from him the contract rights he negotiated for under, among other things, an April 30, 2016 board resolution, executed by Scott and David, that requires board approval for certain corporate actions.

A corporate charter is a grant of authority by the state, which permits stockholders to conduct a business for profit while benefitting from the corporate shield from personal liability. A corporate charter is a creature of legislative grace. J. Hanks, MARYLAND CORPORATE LAW § 1.5 (2019 Supp.). It certainly comes with important rights, particularly for the stockholders. Nonetheless, it also comes with responsibilities, not just to those in control but also "[to] many others who may be associated with or depend on the company – other shareholders, its management, employees, and customers." *Bontempo v. Lare*, 444 Md. 344, 370 (2015). Regrettably, this case evinces a situation of stockholder and director deadlock and dysfunction, of an otherwise financially successful company, the likes of which the court rarely sees. The nicest way the court can say it is that both Scott and David are equally strident in their views and in their belief that each is correct and that the other is incorrect. In this case, the court is easily persuaded that it is confronted with a clear, current circumstance of director deadlock and conflict of significant magnitude to invoke the immediate equity jurisdiction of the court. *Renbaum v. Custom Holding*, 386 Md. 28, 52-53 (2005).

An applicant for a preliminary injunction must satisfy the traditional, common law, four-factor test. Those four factors are:

1. The likelihood that the plaintiff will succeed on the merits;

2. The “balance of convenience” of the parties, which is whether greater injury would result from the issuance of the injunction than from its denial;

3. Whether plaintiff will suffer irreparable injury if the injunction is denied; and

4. The public interest.

Dep’t of Transportation v. Armacost, 299 Md. 392, 404-05 (1984). The burden of proof and persuasion at all times is on the party seeking the injunction. *Eastside Vend Distributors, Inc. v. Pepsi Bottling Group, Inc.*, 396 Md. 219, 241 (2006). The failure to prove the existence of even a single factor ordinarily precludes the grant of a preliminary injunction. *Ademiluyi v. Egbuonu*, 466 Md. 80, 114-15 (2019). In all cases, the decision to grant a preliminary injunction is discretionary. *Lamone v. Schlakman*, 451 Md. 468, 479 (2017).

The common law, four-factor test is not formulaic. There is no specific order in which to consider the factors or the weight each factor will have in a particular case, especially absent an injunction’s effect on a governmental party. See *Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 456 (1995). Further, the four-factor test is not akin to proving the elements of a tort. “The four factors are simply that, *factors*, designed to guide trial judges in deciding whether [a temporary restraining order] should be issued.” *DMF Leasing, Inc. v. Budget Rent-A-Car of Maryland, Inc.*, 161 Md. App. 640, 648 (2005) (emphasis in original). The Court of Appeals recently has noted, however, that, ordinarily the first and the third factors “are generally considered to be the most significant.” *Ademiluyi v. Egbuonu*, 466 Md. at 114-15.

The heart of any corporation are its articles of incorporation and by-laws. In this case, there are questions, which the court does not answer here, as to whether the restated articles, dated April 30, 2016, are in effect, or if an earlier 1998 version governs. What is plain to the court is that Scott and David, who are the only stockholders and directors, cannot operate the

company in conformity with two core documents, the restated by-laws of April 30, 2016, and the board resolution of even date.

The court finds that the parties' differences are fatally irreconcilable. No amount of mediation or discussion will cause either to change his views. The court also finds that, in the absence of judicial intervention, serious harm will result to the corporation, its employees, its customers and, in turn, its stockholders.

The court finds that the directors cannot meet in a productive fashion and that they cannot make joint corporate decisions. The board resolution of April 30, 2016, which is the last joint decision Scott and David have been able to make, has been ignored or over-ridden by the company's officers, in some cases with David's acquiesce. Effectively, given the complete deadlock, the company's officers, not the directors or owners of the company, are the only ones able to make fundamental corporate decisions.

Likelihood of success on the merits is measured by whether the plaintiff's claims in the instant litigation have a realistic chance of being resolved in their favor. *Ehrlich v. Perez*, 394 Md. 691, 708 (2006). The court finds that the plaintiff has met its burden.

Although the Court of Appeals of Maryland has not spoken directly to the specific categories of relief requested in this case, two cases provide significant guidance. The first is *Southern Maryland Agricultural Ass'n v. Magruder*, 198 Md. 274 (1951). In that case, on review of the trial court's appointment of a receiver for a racing corporation, the Court of Appeals stated: "Counsel have referred to no case where a receiver has been appointed to resolve a deadlock in the management of a corporation, and the court has found none. However, there is ample authority elsewhere for this course There is no reason why a receivership should not be used in a proper case to break a deadlock in the management of a corporation where no other

adequate remedy is available to those who would otherwise sustain substantial loss.” 198 Md. at 283-84 (cleaned up). The second case is *Bontempo*, which the court will discuss below.

Courts in states other than Maryland have held that a receiver may be appointed by a court sitting in equity to break a corporate deadlock. *See, e.g., Saltz v. Saltz Bros., Inc.*, 84 F.2d 246 (D.C. Cir. 1936); *Farrar v. Pesterfield*, 116 S.E.2d 229, 231 (Ga. 1960); *Krall v. Krall*, 106 A.2d 165 (Conn. 1954). If ultimately necessary, the receiver also may dissolve the corporation, wind up its affairs and distribute its assets. *Black v. Graham*, 464 S.E.2d 814, 815 (Ga. 1996); *Phillips v. Hove*, 2011 WL 4404034 (Del. Ch., Sept. 22, 2011).

Maryland’s statutes specifically provide only for the remedy of dissolution of a corporation in the event of director or stockholder deadlock, and ancillary to involuntary dissolution, for the appointment of a receiver or trustee. §§ 3-413(a), 3-414(b) Md. Code Ann. Corps. & Assoc. Art. There are no additional express statutory remedies in the deadlock context.² Some states, but not Maryland, have afforded their equity courts express statutory authority to appoint, in addition to receivers, other types of officials, such as custodians and provisional directors.³ Typically, a custodian is appointed when the circumstances suggest that the management of the company can be returned to its directors or stockholders within a reasonable time. The custodian generally has all of the powers of a receiver, except cannot liquidate the corporation without court permission. A provisional director is not a receiver and does not have the powers of a custodian. Such person, however, typically does have all of the powers of a duly elected director.

² Alternatively, a corporation may decide to dissolve voluntarily. § 3-411, Md. Code Ann. Corps. & Assoc. Art.

³ *E.g.*, 8 Del. C. § 226 (appointment of a custodian in the event of deadlock); 8 Del. C. § 353 (appointment of a provisional director); N.J.S.A. § 14A:12-7 (affording specific statutory remedies other than dissolution in a variety of contexts).

Bontempo, in the court’s view, materially clarified the landscape with respect to the remedies available to a trial court in Maryland in the case of director deadlock or dysfunction, short of dissolution and the appointment of a receiver to carry out that dissolution.⁴ The Court of Appeals, generally adopting the approach taken earlier by the Court of Special Appeals in *Edenbaum v. Schwarcz-Ostreicherne*, 165 Md. App. 233 (2005), stated in *Bontempo* that although the only remedy mentioned in the statute is dissolution, “the statute also refers to a court acting as a ‘court of equity,’ which indicates that the Legislature intended for a court to exercise its equitable powers in such a case.” 444 Md. at 368 (footnote omitted). The Court of Appeals in *Bontempo* went on to adopt the “non-exhaustive” set of alternatives to dissolution “that might be appropriate in a particular case” outlined a decade earlier in *Edenbaum*, 165 Md. App. at 260-61.⁵ *Bontempo*, 444 Md. at 368. Both a custodian and a provisional director are needed in this case. Lesser relief will not be sufficient.

Most frequently, “injunctions are designed to maintain the status quo between parties during the course of litigation.” *Eastside Vend*, 396 Md. at 241; see *Lerner v. Lerner*, 306 Md. 771, 776, 791 (1986). However, the status quo in this case is untenable. Mandatory injunctions are permissible when it is necessary to preserve property and the issuance of an injunction is the only realistic and effective way to prevent unnecessary wealth destruction. See *Maryland Trust Co. v. Tulip Realty Co.*, 220 Md. 3299, 412-13 (1959).

⁴ The clarification perhaps was presaged in *Lerner v. Lerner*, 306 Md. 771, 789-90 (1986), quoting *Masinter v. WEBCO Co.*, 262 S.E.2d 433, 439 (W. Va. 1980)(“Winding-up a corporation is so drastic a remedy that it is not ordered if the wrong may be adequately repaired by milder relief.”), as noted in the leading treatise on Maryland corporate law. J. Hanks, MARYLAND CORPORATE LAW § 11.7[b] (2019 Supp.)

⁵ These non-statutory remedies were borrowed largely from the decision of the Supreme Court in Oregon in *Baker v. Commercial Body Builders, Inc.*, 507 P.2d 387 (Or. 1973).

The court finds that the plaintiff has shown that it is likely to succeed on the merits of some of the claims in its complaint. It is clear to the court that the absence of an injunction will result, in a very real way, in a dissipation of corporate assets, a material loss of business, harm employees and customers and jeopardize existing and future business relationships. The court does not have to wait until the ultimate act of corporate destruction occurs.

The real value of the company in this case, the court finds, is its workforce and goodwill in the marketplace. The company has been burning off its existing contracts for the last six months and has lost valuable new business worth approximately \$100 million in bonded jobs. Irreparable injury may exist when there is harm to reputation, goodwill and customer relationships. *In re Shawe & Ething LLC*, 2015 WL 4874733, at *19, *28 (Del. Ch. August 13, 2015), *aff'd*, 157 A.3d 152 (Del. 2017). For that reason, “the danger of losing valuable revenue-generating relationships is a harm that may not be compensable in any manner other than injunctive relief.” *ZRii, LLC v. Wellness Acq. Gp., Inc.*, 2009 WL 2998169, at * 13 (Del. Ch. Sept. 21, 2009).

Even if the plaintiff’s chances on the merits were somewhat less than described above, the equities still favor court intervention, both under the common law and under Section 3-413 of the Corporations and Associations Article. There is, in the court’s view, an immediate need both to preserve the company as an ongoing business, have a board of directors which can make decisions, adjudicate the multitude of disputes between the stockholders and decide whether or not the company should be put up for sale.

Most often, “injunctions are designed to maintain the status quo between parties during the course of litigation.” *Eastside Vend*, 396 Md. at 241. However, mandatory injunctions are permissible when it is necessary to preserve property and the issuance of an injunction is the only

realistic and effective way to carry out its business. *See Southern Maryland Agricultural Ass'n v. Magruder*, 198 Md. at 283-84.

The court finds that the public interest in this case militates in favor of granting a preliminary injunction. The public policy of Maryland with respect to corporations includes protecting the interests of those other than the stockholders and directors. It is clear to the court that the absence of a preliminary injunction will result in, in a very real way, a complete waste of corporate assets, harm to employees and customers and will jeopardize existing and future business relationships. The court does not have to wait until the ultimate destruction of the corporation occurs to act.

For the reasons outlined above, it is this 2nd day of November 2021, at 9:30 a.m.

ORDERED that the plaintiff's motion for a preliminary injunction is granted, in part; and it is further

ORDERED, that defendants Douglas Scott Forrester and David Stephen Forrester, and anyone acting with them in concert or on their behalf, are enjoined from withdrawing any funds from the corporation, absent advance leave of court; and it is further

ORDERED, that Neil A. Greenberg⁶ is appointed Custodian, Provisional Director and Special Fiscal Agent for Forrester Construction Company; and it is further

ORDERED, that Mr. Greenberg shall have all the powers and title of a receiver appointed under §3-414(d) of the Corporations and Associations Article, except that the authority is to continue the business of the corporation and not to liquidate its affairs and distribute its assets, unless the court orders otherwise; and it is further

⁶ A copy of Mr. Greenberg's *curriculum vita* is attached.

ORDERED, that Mr. Greenberg shall have all the rights and powers of a duly elected director of the corporation, including but not limited to the right to notice of and to vote at meetings of directors, until such time as removed by the court; and it is further

ORDERED, that Mr. Greenberg shall investigate whether the business of the company should be continued, whether changes should be made to the operation of the business (including personnel), whether the company should be sold and, if so, the mechanism of any sale; and it is further

ORDERED, that Mr. Greenberg shall be compensated at his customary rate, subject to review and approval by the court, with Forrester Construction Company advancing 100% of the cost, subject to a final allocation or re-allocation of legal fees, expenses and other costs by the court; and it is further

ORDERED, that the corporation shall provide a personal bond in the amount of \$1 million, without surety or other security, under Md. Rule 15-503(c), for the reasons set forth on the record during the hearing on this motion, and, further, because the corporation, the moving party has sufficient funds on hand to indemnify any interested party for any losses; and it is further

ORDERED, that a copy of this Preliminary Injunction shall remain in effect until further order of court, shall be filed with the Clerk of the Court as soon as practicable and shall be sent forthwith by e-mail to counsel for all parties of record and to Mr. Greenberg.



Ronald B. Rubin, Judge

NEIL A. GREENBERG

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QUALIFICATIONS

Chief Operating Officer. Somerset Construction Company, a developer of large mixed-use communities (www.somersetconstruction.com)	1994 - Present
Broker. Maryland Real Estate	1994 - Present
Member. MD Bar, DC Bar, DC Federal Bar & U.S. Supreme Court Bar	1991 – Present
Director. University of Maryland Baltimore Washington Medical Center	2020 – Present
Director. Atlantic Seaboard Dyslexia Education Center	2005 - 2008
Director. Colombo Savings Bank	1998 - 1999
Associate. Tucker, Flyer & Lewis (<i>predecessor to Venable</i>)	1991 - 1993

EDUCATION

Juris Doctor. Georgetown Law Center	1991
BBA in Finance. Emory University, <i>Summa Cum Laude, Valedictorian</i>	1988

PROJECTS

Manager of Master Developer 1,100-acre Arundel Mills Mall (www.simon.com/mall/arundel-mills) a mixed-use community in Western Anne Arundel County, MD. This community contains Arundel Mills Mall (3,000,000 square feet of retail and office space), The Villages of Dorchester (800 townhomes and single family homes), Arundel Overlook (www.sjpi.com/property/detail/arundel_overlook) (313,000 square feet of flex/office space) and Arundel Preserve (www.arundelpreserve.com) (1,750 residential units, 2,300,000 square feet of office space, 400,000 square feet of retail space and 2 hotels).	1994 - Present
Manager of Master Developer 1,000-acre Baltimore Crossroads @95 (www.baltimorecrossroads.com), a mixed-use community in Eastern Baltimore County, MD. This community, at completion, will contain 7,500,000 sq ft of office, flex, R&D, warehouse, manufacturing, retail, hotel and residential space.	2005 - Present
Manager of Master Developer Annapolis Junction Town Center (www.annapolisjunctiontowncenter.com) a mixed-use community in Howard County, MD. This community is being developed for 701 apartments, 100,000 square feet of office, a 108-room hotel and 12,000 square feet of retail space.	2012 - Present
Co-Developer (Residential & Retail) Melford Town Center (www.MelfordTownCenter.com) a mixed-use community in Bowie, MD which will contain 1,260 apartment homes, 247 townhomes, 140 senior living homes and a retail center.	2017 - Present