IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

KAREN R. GOOZH, *et al.*, :
Plaintiffs, :
: Case No. 386548-V
v. :
HOWARD RICHMOND, *et al.*, :
Defendants. :

MEMORANDUM AND ORDER

The four plaintiffs in this case each own 14.3% of the stock of The Richmond Corporation, a corporation chartered in the District of Columbia with its principal place of business in Montgomery County, Maryland. The individual defendant, Howard Richmond is the president of the corporation and owns 42.5% of the corporate stock. The Richmond Corporation also is named as a defendant.

The parties own their stock subject to a Stockholders' Agreement dated January 1, 1998 ("the Stockholders' Agreement"). The Stockholders' Agreement is comprehensive. Its principal purpose is "to restrict the transferability of [the stock] owned from time to time by the Stockholders, to provide for certain purchase options upon the occurrence of certain events, [and] to provide for the continued maintenance of the tax status of the Company."[1] The Stockholders' Agreement governs voluntary transfers, involuntary transfers, and changes of control[2] and determines the price to be paid[3] and the terms of payment.[4] It also addresses

[1] Section R-3 of the Stockholders' Agreement.

[2] Sections 2, 3 & 4.

[3] Section 5.

[4] Section 6.

maintaining the corporation's election, for tax purposes, to be qualified under Subchapter S of the Internal Revenue Code.[5]

Particularly germane to this case are Sections 8 and 10 of the Stockholders' Agreement. Section 8 provides, in pertinent part, that during the term of the agreement, each stockholder "agrees that all [s]hares owned by each such party shall be voted in favor of the election of directors nominated by the President of the Company at the annual meeting of Stockholders or at any special meeting of the Stockholders called for the purpose of electing directors." In other words, under Section 8, when the Stockholders' Agreement is in effect, the plaintiffs must vote for the directors nominated by the president of the company, which, at all relevant times, has been Defendant Howard Richmond.

Section 10 provides that the agreement "shall terminate upon any of the following" three designated events. The first event of termination is the effective date of a registration statement filed under the Securities Act of 1933. The second event of termination is when all of the corporate stock, whether of record or beneficially, is owned by a single individual. The third termination event, which is the event at issue in this case, is "[t]he liquidation or dissolution of the Company."

On January 28, 2014, the plaintiffs filed suit seeking two forms of declaratory relief. In count one, the plaintiffs ask the court to declare that the Stockholders' Agreement has been terminated on account of the dissolution of the corporation by reason of the revocation of its charter for failing in 2005 to file a report with the District of Columbia Department of Consumer and Regulatory Affairs. Notwithstanding that the charter has since been reinstated, the plaintiffs assert that the failure to file resulted in an event of dissolution under Section 10(iii) of the

[5] Section 7.

Stockholders' Agreement, which, in turn, terminated the contract. In count two of the complaint, the plaintiffs ask the court to declare that several sections of the corporate bylaws were amended at the December 30, 2013, stockholders' meeting.

The plaintiffs have moved for partial summary judgment, seeking a declaration that the Stockholders' Agreement has been terminated. The plaintiffs also ask the court to declare that their slate of directors was validly elected at the stockholders' meeting of December 30, 2013. Both defendants Howard Richmond and The Richmond Corporation have opposed the motion. The court held a hearing on June 15, 2014. For the reasons discussed below, the motion will be granted in part and denied in part.

Summary Judgment Standards

Summary judgment may only be granted if two conditions are met. First, the moving party must establish there is no genuine dispute as to any material fact. Second, the moving party must establish that it is entitled to judgment as a matter of law.[6] Absent the concurrence of both elements, the motion must be denied.[7] Under Maryland Rule 2-501, the court reviews the record in the light most favorable to the non-moving party and construes any reasonable inferences that may be drawn from the evidentiary materials properly of record against the moving party.[8]

Disputed facts are material for summary judgment purposes only if they "somehow affect the outcome of the case."[9] "Facts that do not pertain to the core questions involved are not

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[6] *David A. Bramble, Inc. v. Thomas,* 396 Md. 443, 453-54 (2007).

[7] *Okwa v. Harper*, 360 Md. 161, 177-78 (2000).

[8] *Tyler v. City of College Park*, 415 Md. 475, 498-99 (2010).

[9] *King v. Bankerd*, 303 Md. 98, 111 (1985).

'material' and, consequently, are insufficient to avert a proper motion for summary judgment."[10] "When the moving party has provided the court with sufficient grounds for summary judgment, the opposing party must demonstrate that there is a genuine dispute of material fact by presenting facts that would be admissible in evidence."[11]

If no genuine dispute of fact exists, the court then considers whether the moving party is entitled to judgment as a matter of law.[12] In an appropriate case, the court may grant summary judgment in a declaratory judgment action, in whole or in part.[13] However, if a stockholder's agreement is ambiguous, summary judgment is not appropriate.[14]

Construction of the Shareholders' Agreement

A stockholder's agreement, like bylaws or a corporate charter, is interpreted using the customary principles of contact interpretation.[15] Generally, the meaning of a contract, or of particular contractual language, is a question to be decided by the court based on its review of the four corners of the instrument, unless the instrument is ambiguous.[16]

When the language of the contract is clear, the court will presume that the parties intended what they expressed, even if the expression differs from the parties' current intentions or the secret intentions they harbored at the time they created the contract. The test in the

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[10] *Warner v. German*, 100 Md. App. 512, 517 (1994).

[11] *Gross v. Sussex Inc.*, 332 Md. 247, 255 (1993).

[12] *Dolan v. McQuaide*, 215 Md. App. 24, 31 (2013).

[13] *Prime Venturers v. OneWest Bank Grp., LLC*, 213 Md. App. 122, 134 (2013).

[14] *GMG Capital Inv., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 783-84 (Del. 2012).

[15] *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990).

[16] *Abderlrhman v. Ackerman*, 76 A.3d 883, 887 (D.C. 2013).

District of Columbia is objective, not subjective.[17] If a contract is ambiguous, the trial court may consider parol evidence to ascertain the parties' intent, as long as the evidence is used to explain but not to contradict the instrument.[18]

Discussion

The Richmond Corporation was incorporated on December 29, 1959, in the District of Columbia. Originally called North American Mortgage and Development Corporation, the name of the corporation was changed to The Richmond Corporation on November 27, 1961. The company was formed primarily for the purpose of managing and leasing commercial property.

On January 1, 1998, all of the stockholders of the corporation entered into the Stockholders' Agreement, which is the subject of this lawsuit. On that same date, the corporation adopted Amended and Restated Bylaws ("the Bylaws.")

Section 10 of the Bylaws requires the corporation to hold an annual meeting in December of each year. Among other things, the stockholders are to elect directors at each annual meeting by plurality vote. Voting may be in-person or by proxy. Directors are to serve "for the ensuing year and until their successors are elected or chosen." Section 26 of the Bylaws requires the corporation to have three directors.

As noted above, Section 8 of the Stockholders' Agreement requires every stockholder, while the agreement is in effect, to vote in favor of the directors nominated by the president of the corporation. At the annual meeting held on December 30, 2013, the plaintiffs refused to vote for the directors nominated by the president, Defendant Howard Richmond, taking the position that the Stockholders' Agreement had been terminated. Instead, the plaintiffs moved the

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[17] *Capital City Mortg. Corp. v. Habana Vill. Art & Folklore, Inc.*, 747 A.2d 564, 567 (D.C. 2000).

[18] *Abderlrhman*, 76 A.3d at 888-89.

nomination of a different slate of three directors and purported to cast their votes in favor of that slate. Richmond and the corporation took the position that the slate of directors nominated by Richmond had been duly elected, as the plaintiffs were still bound by the Stockholders' Agreement. The plaintiffs demurred and this litigation ensured.

The District of Columbia, like most states,[19] requires corporations to file reports on a regular basis. The purpose of the reports generally is to keep the public and the government apprised of the address of the corporation and its resident agent, as well as a description of its business. In 2005, all District of Columbia corporations were required to file a biennial statement with the Mayor's office stating, among other things: (1) the name of the corporation; (2) the name and address of the corporation's registered agent within the District; the address of the corporation's principle office; and the names and addresses of the directors.[20] The report must be signed by a corporate officer.[21] If a corporation does not file its statutorily required report, its charter is administratively dissolved.[22]

Like most other states,[23] the District of Columbia has a statutory procedure to reinstate a corporation that has been dissolved for failing to file the required reports.[24] Most reported cases

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[19] MD. CODE ANN., CORPS. & ASS'NS, § 3-503 (West 2014); *see Messall v. Merlands Club, Inc.*, 244 Md. 18 (1966).

[20] D.C. Code § 29-101.98(a) (2001).

[21] § 29-101.98(c) (2001).

[22] § 29-101.122 (2001); *see Dual Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 163 (2004) ("A corporation, the charter for which is forfeit, is a legal non-entity.").

[23] MD. CODE ANN., CORPS. & ASS'NS, §§ 3-507, 3-512 (West 2014). For discussions of the effect of revival, *see Stein v. Smith*, 358 Md. 670, 676 (2000); *Hill Constr. v. Sunrise Beach, LLC*, 180 Md. App. 626, 635-38 (2008).

[24] D.C. Code § 29-101.127 (2001).

involving a reinstatement of a corporate charter after a dissolution or forfeiture concern whether the directors are personally liable for acts taken in the name of the corporation during the period of dissolution or whether corporate acts performed during that period become valid upon reinstatement.[25] In other words, most cases address whether the subsequent reinstatement "relates back" to cover acts or omissions that occurred during the period when the corporation was not lawfully allowed to act in entity form.

This case is different than most in that the court is not asked to decide on the validity of corporate acts or the personally liability of officers and directors for acts taken during the period of administrative dissolution. Instead, this case presents the novel question of what effect does administrative dissolution have on a stockholders' agreement, particularly one which provides expressly that it terminates upon the dissolution of the company. The case also presents the question of the effect on such a stockholders' agreement of a reinstatement of the corporate charter, in this case by the Mayor of the District of Columbia.

It is undisputed that the corporation failed to file a statutorily mandated biennial report on April 15, 2005, and that the Mayor of the District of Columbia issued a proclamation on September 12, 2005, stating that the corporation was "deemed to have been dissolved," in accordance with section 29-101.123 of the D.C. Code. The plaintiffs contend that the Stockholders' Agreement was terminated upon the issuance of the proclamation. The defendants take a contrary view, contending that this dissolution was simply technical in nature and was

[25] *See, e. g, Moore v. Occupational Safety & Health Review Comm'n*, 591 F.2d 991 (4th Cir. 1979) (Virginia); *Pannell v. Shannon*, 425 S.W.3d 58 (Ky. 2014) (Kentucky); *Daniels v. Elks Club of Hartford*, 58 A.3d 925 (Vt. 2012) (Vermont); *Tri-County Unlimited, Inc. v. Kids First Swim Sch., Inc.*, 191 Md. App. 613, 620-22 (2010).

cured on April 30, 2008, when the Mayor "annulled" the prior proclamation once the corporation filed the required report.[26]

It also is undisputed that the corporation, for a second time, failed to file the required two-year report on April 15, 2009. The Mayor again issued a proclamation dissolving the corporation, this time on September 12, 2009. This second administrative dissolution was "revoked" on December 13, 2013. Under the then-existing statute, the reinstatement expressly related back to the date of administrative dissolution.[27]

The language of the District of Columbia statutes pertinent to this case changed between the first administrative dissolution in 2005, and the second in 2009. Under the statutes in effect in 2005, if the corporation failed to file its biennial report "the articles of incorporation shall be void and all powers conferred upon such corporation are declared inoperative."[28] Further, upon publication of the Mayor's proclamation listing the corporations that have failed to file their reports, the corporation "*shall be deemed to have been dissolved without further legal proceedings* and each such corporation shall cease to carry on its business . . . ."[29] Under the statute applicable in 2005, if a petition for reinstatement is granted by the Mayor, "the revocation proceedings theretofore taken as to such corporation by proclamation shall be deemed to be annulled" and the corporation "shall have such powers, rights, duties, and obligations it had at

[26] § 29-101.127 (2001).

[27] § 29-106.03(d) (2010).

[28] § 29-101.122 (200l).

[29] § 29-101.123 (2001) (emphasis added).

the time of the issuance of the proclamation with the same force and effect as to such corporation as if the proclamation had not been issued."[30]

The language of the statute in effect during the period 2009 through 2012 similarly provided for the Mayor to void the articles of incorporation of any corporation that failed to file the required report.[31] Upon the publication of the mayoral proclamation, the corporation is deemed to have been administratively dissolved and is to cease carrying on its business except as required to wind up its affairs.[32] The reinstatement language in effect as of 2010, however, expressly provides that once a charter is reinstated it "shall relate back to, and be effective, as of the effective date of the administrative dissolution, and the domestic entity shall resume carrying on its activities and affairs as if the administrative dissolution had never occurred . . . ."[33]

Both parties cite to two cases decided by the District of Columbia Court of Appeals to support their respective arguments: *Accurate Construction Co. v. Washington*[34] and *T.K., Inc. v. National Community Reinvestment Coalition, Inc.*[35] Both cases are instructive but not dispositive.

In *Accurate Construction*, the articles of incorporation of a home improvement contractor had been revoked at the time it entered into a home improvement contract, the payment of which

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[30] § 29-101.127(c) (2001).

[31] § 29-106.01 (2010).

[32] § 29-106.02 (2010).

[33] § 29-106.03 (2010).

[34] 378 A.2d 681 (D.C. 1977).

[35] 76 A.3d 895 (D.C. 2013).

was secured by a note and a deed of trust.[36] After the death of the maker of the note and deed of trust, the beneficiary of title to the land brought suit to cancel the note and void the deed of trust on the ground that the contractor's charter had been revoked at the time the instruments were executed. The trial court granted the plaintiff's motion for summary judgment, and the appellate court affirmed. The corporation argued on appeal that the subsequent reinstatement of its charter operated to validate the corporate action at issue. The District of Columbia Court of Appeals disagreed, holding that under the revocation statute, "the corporation lacked the capacity to contract when it did, and that the legal instruments at issue here were void."[37] The court expressly rejected the argument that the subsequent "annulling" of the revocation by mayoral proclamation operated to validate corporate acts taken during the period before reinstatement. The court reasoned:

> "The purpose of revocation is obviously to prohibit a corporation from enjoying the privileges of that status when it has failed to perform its resultant responsibilities. Revocation is a disability imposed on a corporation as a penalty. It would deprive the statute of its force and encourage a corporation to default on paying its taxes and fees and filing its annual reports if by subsequent compliance such a corporation could at its convenience completely erase the effects of the penalty."[38]

In *T.K., Inc.*, in 1993, the parties entered into a ten year lease for restaurant space in the District of Columbia.[39] Near the end of the initial term, in March 2003, the parties amended the lease to extend it for an additional ten year term to begin on September 1, 2003. In January 2008, the tenant fell behind in its rent payments, and the landlord sued for possession.

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[36] 378 A.2d at 682-83.

[37] *Id.* at 684.

[38] *Id.* at 685.

[39] *T.K., Inc.*, 76 A.3d at 896.

Unbeknownst to the landlord, the tenant's articles of incorporation were revoked in 2005 for failing to file the reports required by statute but were reinstated in 2007.[40]

In 2009, the landlord filed a complaint for breach of contract against the guarantor of the lease, seeking the recovery of unpaid rent. Later the tenant was added as a party. The tenant filed a counterclaim contending that it was wrongfully evicted.[41] The landlord moved to dismiss the counterclaim on the ground that the tenant's interest in the premises ceased when its charter was revoked and that interest was not revived when the charter was reinstated in 2007. The trial court agreed and dismissed the counterclaim.

On appeal, the tenant argued that the trial court erred in concluding that its interest in the leasehold expired when its charter was revoked and was not revived by the subsequent reinstatement.[42] The District of Columbia Court of Appeals reversed, holding that the tenant's counterclaim was viable because it had entered into the lease extension before the charter was revoked in 2005. And, when its charter was reinstated in 2007, its powers to act as a corporation were fully restored, allowing it to bring the counterclaim.[43]

In this case, the defendants contend that the Stockholders' Agreement remains in effect because, first, it was validly entered into before its charter was revoked and, second, remained valid after the charter was reinstated. They reason that this result is dictated by *T.K., Inc.*, because, like in that case, a contract was made when it was lawful for the corporation to do so, the corporation continued to exist even after it was administratively dissolved and the

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[40] *Id.* at 896-97.

[41] *Id.* at 897-98.

[42] *Id.* at 898.

[43] *Id.* at 900-01.

reinstatement of its charter relates back to the date of administrative dissolution. Accordingly, they assert, the court should deny the plaintiffs' motion for partial summary judgment.

The defendants further contend that there are disputed questions of material facts surrounding whether the plaintiffs actually voted for directors other than those nominated by Howard Richmond, and whether certain bylaw amendments proposed by the plaintiffs were enacted at the annual meeting held on December 30, 2013.[44] Defendant Richmond also contends that discovery is necessary to enable his to develop his affirmative defenses, including limitations, waiver, unclean hands and laches.[45]

For the reasons that follow, the court will grant plaintiffs' motion for partial summary judgment with respect to the termination of the Stockholders' Agreement. The other matters raised in their motion, including the election of directors and the adoption of bylaw amendments, require factual determinations, precluding the grant of summary judgment.

Neither nor *Accurate Construction Co.* nor *T.K., Inc.*, are dispositive of the question presented in this case. Of course, each case's reasoning and discussion of District of Columbia statutes informs this court's decision. What the court must attempt to do is to predict how the District of Columbia Court of Appeals would decide this case. This case appears to be one of first impression.

Although the term "dissolution" as used in the Stockholders' Agreement is not a defined term, the contract is not ambiguous. There is no basis in this case, therefore, to resort to any

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[44] See Affidavit of Stuart Kriss, dated May 8, 2014, at ¶¶ 9-23.

[45] The affidavit of Howard Richmond, attached to his opposition to the plaintiffs' motion for partial summary judgment is factually insufficient to invoke Md. Rule 2-501(d), for the reasons outlined by this court in *Bennett v. Damascus Cmty. Bank*, No. 267722-V, 2006 WL 2458718, at *5 (Md. Cir. Ct. April 6, 2006).

extrinsic evidence.[46] Thus, under the objective rule of contracts, the court simply must give that term the meaning a reasonable person in the position of the parties would have given it at the time of contract formation.

The court has concluded that each version of the reinstatement provision of the District of Columbia statutes, fairly read in context, only restores the power of the corporation to lawfully conduct business as if the dissolution never occurred. However, neither the 2001 reinstatement statute nor its 2011 successor addresses the effect of an administrative dissolution on a contract that contains an express, unqualified provision that the contract shall terminate upon the "dissolution" of the company. Objectively speaking, what happened in September 2005 (and again in September 2009) was a dissolution of the corporation under the law of the District of Columbia.[47] The fact that the corporation it still existed even after it was dissolved, and was not wound up, is not controlling, as those legal concepts are separate and distinct from a dissolution.[48]

The drafters of the Stockholders' Agreement could have defined the term dissolution narrowly to mean, for example, events such as a judicial dissolution, the voluntary filing of articles of dissolution by stockholders, or the filing of a petition by a stockholder or a creditor seeking an involuntarily dissolution if it became impracticable for the corporation to carry on its regular affairs. But the parties to this Stockholders' Agreement did not purport to define or cabin the term dissolution narrowly. They easily could have done so as a matter of drafting. For example, the term "dissolution" could have been more precisely defined, as other terms were in Section 1 of the contract, which specifically defines ten terms of the contract.

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[46] *See Tillery v. District of Columbia Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006); *Newell v. Johns Hopkins Univ.*, 215 Md. App. 217, 236 (2013).

[48] *See T.K., Inc.*, 76 A.3d at 899-900 (noting that after an administrative dissolution, the corporation continues to exist for three years in order to wind up its affairs).

The term dissolution could expressly have been defined not to include "technical" or "administrative" dissolutions. But the drafters of this contract did not do so and the court will not now insert language into a contract simply because, in hindsight, it may have been prudent to do so at the time of contract formation.

The court concludes that The Richmond Corporation was dissolved as a matter of law on September 12, 2005. On that day, the Stockholders' Agreement was terminated under Section 10, and the plaintiffs' rights to vote their stock was returned to them at that time. Once this transfer of rights occurred, no subsequent statutory revival of the corporation, even one that "relates back," can thereby divest the plaintiffs of property interests that had been restored to them under the express terms of their contract.[49] The defendants had it wholly within their power to avoid the result reached in this case, but they failed, twice, to do so.[50]

For the reasons set forth above, the plaintiffs' motion for partial summary judgment is granted, in part. It is so ordered this 8th day of July, 2014. Counsel shall submit a proposed form of declaratory judgment, consistent with this order, within ten days of entry of this order.

Ronald B. Rubin, Judge

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[49] *See* 16A Fletcher, CYC. CORP. § 8112.30 (2014) (Generally, reinstatement of a corporation "will not impair the property rights of third parties that have intervened during the period of delinquency or restore title to assets that have been distributed to others.") (footnotes omitted); *Cloverfields Improvement Ass'n, Inc. v. Seabreeze Prop., Inc.*, 32 Md. App. 421, 434 (1976), *aff'd*, 280 Md. 382 (1977) ("[T]he revived corporation may only take title to those assets which were legally not disposed of during the period of corporate demise.").

[50] To be clear, the Stockholders' Agreement was terminated on September 12, 2005, upon the Mayor's proclamation of corporate dissolution for failure to meet statutory requirements. The corporation's failure to comply with the statute in 2009 has no legal effect on the existence of the contract, which had already terminated upon the dissolution of the corporation in 2005.