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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM B. WEINBERGER, Plaintiff,	)	
v.	)	Civil Action No. 5642
UOP, INC., et al., Defendants.	)	

MEMORANDUM OPINION

Submitted: February 1, 1979
Decided: April 3, 1979

William Prickett, Esquire, of Prickett, Ward, Burt & Sanders, Wilmington, for Plaintiff

A. Gilchrist Sparks, III, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, for Defendant UOP, Inc.

Robert K. Payson, Esquire, of Potter, Anderson & Corroon, Wilmington, and Alan N. Halkett, Esquire, of Latham & Watkins, Los Angeles, California, for the Defendant The Signal Companies, Inc.

R. Franklin Balotti, Esquire, of Richards, Layton & Finger, Wilmington, for Defendant Lehman Brothers Kuhn Loeb, Inc.

BROWN, *Vice Chancellor*

On May 26, 1978 a plan of merger was approved by the shareholders of the defendant UOP, Inc. ("UOP"), as a result of which UOP became the wholly-owned subsidiary of the defendant The Signal Companies, Inc. ("Signal"). Immediately prior to the merger, Signal owned 50.5 per cent of the outstanding common stock of UOP. The merger was accomplished by merging Sigco, Incorporated, then a wholly-owned subsidiary of Signal, with and into UOP, with UOP being the surviving corporation. Through this mechanism, Signal, in effect, acquired the remaining 49.5 per cent of the outstanding shares of UOP for the cash payment of $21 per share. The Merger Agreement adopted by the UOP shareholders became effective upon its filing with the Secretary of State on May 26, 1978. Among other things, the Merger Agreement provided as follows:

> "Each share of Common Stock, $1.00 par value of UOP (herein called the 'UOP Stock'), other than those shares then held by The Signal Companies, Inc., a Delaware corporation (herein called 'Signal'), or held in the Treasury of UOP, which shall be outstanding at the Effective Time of the Merger shall, at such time and by virtue of the merger without any action on the part of the holder thereof, be converted into and exchanged for the right to receive $21.00 cash, payable by the surviving corporation, and each holder of such UOP stock, at the Effective Time of the Merger (except Signal and the Shares held in the Treasury of UOP), shall, upon the merger, cease being a stockholder of UOP and shall by such merger be converted from a stockholder into a creditor of UOP for an amount equal to the product of the number of shares of UOP Stock held of record by such holder at the Effective Time of the Merger and $21.00." (Emphasis added.)

Plaintiff was a shareholder of UOP prior to the date of the merger. Subsequent to the merger, plaintiff filed this action alleging that the merger was illegal because it was not accomplished in furtherance of a bona fide business purpose and because the price of $21 per share offered to the minority shareholders of UOP in connection with the merger was grossly inadequate. By his complaint, plaintiff purports to assert individual, class and derivative claims seeking money damages and "such other and further relief as may be just" for the injuries allegedly occasioned by the conduct of the defendants. UOP, Signal and Sigco are all named as defendants. Other named individual defendants have since been dismissed by stipulation of the parties.

Signal has now moved to dismiss the derivative claims asserted on behalf of UOP and, further, it has moved to quash service of process on Sigco. In addition, a problem has arisen concerning discovery which has resulted in a motion by plaintiff pursuant to Rule 37 to compel answers to deposition questions. These motions were briefed and argued together. I deal with them in the order set forth.

I.

The motion to dismiss the derivative claims is predicated upon two grounds. First, based on the foregoing language of the merger agreement which provides that

upon it becoming effective all former minority shareholders of UOP were automatically converted into creditors of UOP, it is argued that plaintiff ceased to be a shareholder of UOP on May 26, 1978 and that as a consequence, he now lacks standing to maintain a derivative action. Second, since Signal is now the sole owner of all outstanding UOP stock as a result of the merger, it is argued that any claims made derivatively on behalf of UOP against Signal have become moot since a claim for damages to UOP constitutes an asset of UOP which is now owned entirely by Signal.

It would appear that to resolve this issue one would need go no further than the case of Heit v. Tennaco, Inc., 319 F.Supp.884 (D.Del.1970). There the plaintiff was a stockholder of J. I. Case Company (Case). Through a subsidiary, Tennaco controlled Case. Plaintiff brought a derivative suit against Tennaco on behalf of Case for alleged misappropriation of corporate opportunities belonging to Case. While this suit was pending, Case was merged into another subsidiary controlled by Tennaco. Under the terms of the merger agreement the minority shareholders of Case became entitled to receive preferred stock in Tennaco. Following the merger, Tennaco moved for summary judgment on the derivative claims asserted on behalf of Case, contending that as a result of the merger, the plaintiff was no longer a stockholder of Case and

consequently lacked standing to maintain a suit derivatively on its behalf. In granting this motion, the Court noted as follows at 319 F.Supp. 886:

> "The stock held by the minority stockholders of Case, including the plaintiff, was by virtue of the mergers automatically converted on the merger date into $5.50 Cumulative Convertible Preferred Stock of Tennaco, Inc."

Citing Braasch v. Goldschmidt, Del.Ch., 199 A.2d 760 (1964), it was held that as a result of the merger neither plaintiff nor any other former shareholder of Case had the requisite standing to maintain a derivative action on behalf of Case.

In the present case, as in Heit v. Tennaco, Inc., the plaintiff was, by virtue of the terms of the merger, automatically converted from a shareholder of UOP into a creditor of Signal as of the date the merger became effective. Since he had lost his status as a shareholder prior to the filing of his suit, plaintiff cannot maintain an action derivatively on behalf of UOP for damages allegedly sustained by it as a result of the merger. The elements upon which plaintiff would rely to establish damage to UOP, namely, the terms of the merger, also serve to eliminate his capacity to sue derivatively. He may not have it both ways, i.e., ignore the provision of the merger agreement which automatically removes him as a stockholder while relying on the fact that the merger has been accomplished in order to recover damages on behalf of the corporation.

Since plaintiff was not a stockholder of UOP at the time that his suit was filed, it follows that the motion to dismiss the derivative claims must be granted. Compare Dann v. Chrysler Corp., Del.Ch., 174 A.2d 696 (1961). It is thus unnecessary to consider the alternative argument that the derivative claims have become moot.

II.

As to the motion to quash service of process as to Sigco, Incorporated, it too must be granted. The merger combined UOP and Sigco, with UOP being the survivor. The merger agreement became effective when filed with the Secretary of State on May 26, 1978. Under the terms of the merger, Sigco ceased to exist as of the effective date of the merger. The service of the summons and complaint here was purportedly made upon the registered agent of Sigco on July 6, 1978. Thus service was attempted on Sigco some six weeks after it legally ceased to exist as a Delaware corporation.

This is the same situation that existed in Beals v. Washington Intern., Inc., Del.Ch., 386 A.2d 1156 (1978). That decision held that a corporation which was merged into another corporation could not be served with process after the merger even though the purpose of the action was to rescind the merger. The rationale and holding in Beals is controlling here, and service of process as to Sigco must be quashed. In light of the Beals decision, it

would be an exercise in futility to grant the plaintiff leave, as he apparently requests, to attempt to effect service on Sigco by means of service upon the Secretary of State pursuant to 8 Del.C. § 321(b). The problem here does not lie with the practical difficulty in serving a corporate party. Rather, the problem is that the corporate party sought to be served does not legally exist.

III.

As part of the merger proposal, an opinion was obtained from Lehman Brothers Kuhn Loeb, Inc. ("Lehman Brothers") as to the fairness of the terms of the merger to the minority shareholders of UOP. Plaintiff has joined Lehman Brothers as a party defendant, alleging conspiratorial involvement on its part. Specifically, plaintiff charges that Lehman Brothers was involved with Signal to such an extent that its fairness opinion to UOP cannot be considered as having come from one that was truly independent.

During discovery, Lehman Brothers has produced a document from its files which, by its cover, purports to be a confidential report addressed to Forrest N. Shumway, president of Signal. This report is dated some two years prior to the date of the merger. It appears to express the opinion of Lehman Brothers that it would be advisable for Signal to acquire the remaining 49.5 per cent minority interest in UOP. It also appears to recommend an acquisition

price of up to $21 per share for the minority interest, that being the amount ultimately paid to the minority as a part of the merger.

At the same time, there is no present indication as to who at Lehman Brothers prepared this report or as to the purpose for which it was prepared. The present record indicates that Mr. Shumway had not seen the report or known of its existence prior to the filing of this suit. Apparently, no copy of this report has been found in the files of either Signal or UOP. Mr. James V. Crawford, president of UOP, was not aware of this report prior to the merger and, in fact, did not see it until the day immediately prior to his deposition. Even then, he only looked at the cover page and did not read its contents.

At his deposition, it was established that Mr. Crawford had not seen the document until the preceding day. Counsel for plaintiff then proceeded to read passages from the report, following each such recitation with a question to the effect that, if Crawford, as president of UOP, had known of the existence of this confidential report prior to the merger, would he have caused UOP to retain Lehman Brothers to give an independent opinion as to the fairness of the terms of the merger to the minority shareholders of UOP? Counsel for the defendants objected to each of these questions on the

grounds that they were speculative and constituted hypothetical questions without a proper foundation. Further, Mr. Crawford was directed not to answer such questions by counsel for UOP. Plaintiff thereupon moved for an order to compel Crawford to answer.

I conclude that the motion should be granted and the line of questions answered, provided, of course, that it is not carried on ad nauseum to the point of harassment.

I am not convinced that the issue goes to the improper use of a hypothetical question as the defendants contend. Crawford was not being deposed as an expert. He was being examined as president of one of the defendant corporations and was being asked, for discovery purposes, what he would have done in that capacity if he had been aware of the existence of the earlier Lehman Brothers report. As such, the questions put to him were not dependent upon the accuracy of the report, the reason that it was prepared or the identity of the person who prepared it. Rather, the questions were based upon the existence of the report, i.e., would his judgment have been different had he known that Lehman Brothers had in its files an earlier document evaluating and favoring action by Signal on the very matter as to which it was being asked to express an independent opinion.

At the same time, I cannot accept plaintiff's

premise that Crawford was being asked to state facts, and not opinion. It seems obvious to me that to ask a person to evaluate a previously unknown fact and to state what he would have done had he known at a time past that such additional fact existed, is to ask for his opinion. At 2 Jones, On Evidence (6th ed. 1972) § 14.2 it is stated as follows at page 589:

> "Ordinary opinion evidence has been said to be that given by a witness who is of ordinary capacity and who has by opportunity acquired a particular knowledge which is outside the limits of common observation, and which may be of value in elucidating a matter under consideration."

In his capacity as president of a large corporation it would seem that Mr. Crawford would have had an opportunity to acquire knowledge outside the limits of the average person which would enable him to express his opinion as to the qualifications expected of one being sought to render an independent opinion as to the fairness of a corporate merger. This was essentially what he was being asked by the deposition questions propounded by plaintiff.

At the same authority previously quoted, it is stated as follows:

> "A modern and enlightened summation of the rule representing the prevailing and better law on the subject is contained in the Uniform Rules of Evidence [which is substantially the same as Rule 701 of the Federal Rules of Evidence] to the effect that the opinion testimony

> of the non-expert witness 'is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.' The rule further provides that opinion testimony is not objectionable on the ground that it embraces the ultimate issue to be decided by the trier of the fact."

Based upon the foregoing, I am persuaded that the line of inquiry proposed to Mr. Crawford was not objectionable per se. Rather, it was of a nature that would leave the eventual question of admissibility to the discretion of the trial judge based upon the circumstances then existing, i.e., would the answers to such conjectural questions be helpful to the determination of a fact in issue. Since they obviously call for an expression of hindsight judgment, I would not find them to be of any particular evidentiary value, standing alone, in the present status of affairs. They could also be deemed argumentative. What Crawford might have done had he known something at the time, when compared against his actual state of unawareness, does not go to establish the deliberate scheme or conspiracy alleged by the plaintiff between Crawford, Signal and Lehman Brothers; nor is it probative of the plaintiff's allegation that the fairness opinion given by Lehman Brothers some two years after this mysterious and apparently undelivered report was not a true and

independent analysis of the terms of the merger.

This, however, brings us to the crux of the matter. The purpose of the questions at this stage was not to place the answers in evidence before the Court. Rather, they were asked as part of the discovery process. For discovery purposes, I cannot say that the line of inquiry was without some relevance. The questions dealt with a document which, on its face, would tend to cast some doubt upon the impartiality of Lehman Brothers, depending upon who was aware of the existence of the document. And the plaintiff's allegations have placed the impartiality of Lehman Brothers at issue. Moreover, no claim of privilege has been asserted on behalf of the defendants.

Rule 26(b) provides that discovery may be had "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." It is further provided at Rule 26(b) as follows:

> "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

On the record presented for argument on this motion, I cannot say that the responses sought from Mr. Crawford are not reasonably calculated to lead to the discovery of admissible evidence. Knowing what action, if any, he would have taken had he known of the report and its content

might possibly put the plaintiff on the trail of other information which would lead to an explanation of the document. And the document certainly needs an explanation.

In conclusion, I can find no justification for the direction given to Mr. Crawford to not answer the questions. This is particularly true in light of the position taken by UOP's counsel at the deposition that he was willing to produce Mr. Crawford at a later date to answer the questions concerning the report after "we have had sufficient facts to know what is behind this document and what these representations mean or don't mean."

Plaintiff is entitled to an order to compel discovery pursuant to Rule 37. Counsel for plaintiff should submit an affidavit in support of his application for counsel fees for briefing and arguing the motion. If the defendants desire an opportunity to be heard on the matter of the fee to be allowed, I would ask that they advise promptly upon receipt of a copy of the affidavit of plaintiff's counsel.

Counsel for plaintiff is asked to submit a form of order as to the Rule 37 motion. Counsel for the defendants are asked to submit a separate form of order concerning the motion to dismiss the derivative counts of the complaint and to quash service of process as to Sigco, Incorporated.