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*Re: In Re Carver Bancorp, Inc.
C.A. No. 17743-NC*

Submitted: April 19, 2000
Decided: April 24, 2000

Counsel:

Plaintiff BBC Capital Markets moves for partial summary judgment on Count V of its second amended complaint seeking an order invalidating votes cast by proxy for 86,382 unallocated ESOP shares of defendant Carver Bancorp. The inspector at Carver's annual meeting refused a challenge to the purported proxy of the Federal Home Loan Bank of Pittsburgh and counted the votes in the proportion

called for by the ESOP plan after finding the proxy to be presumptively or perhaps (if there were such a word) “assumptively” valid.

80,274 allocated shares beneficially held by plan participants were voted, and counted, without challenge. If the inspector inappropriately counted the 86,382 unallocated shares, two Carver nominees for the board on the present record would be defeated and two BBC nominees would be elected.

Because the undisputed record shows that HSBC Bank USA signed and submitted the proxy purporting to vote the Carver ESOP’s 86,382 unallocated shares and that HSBC was neither the record holder, the custodian of the shares nor a holder of a *bona fide* proxy, the Inspector of Election erred as a matter of law when he counted the proxy on the mere assumption that it appeared valid. BBC is entitled to summary judgment that the 86,382 unallocated ESOP shares can not be counted.

BBC’s demand that the Court declare that the Inspector erred would entitle BBC to summary judgment invalidating the vote which could result in the election of BBC’s nominees to the board and the ouster of two current “management directors” declared elected at the meeting of February 24, 2000.

Discussion

BBC’s demand for summary judgment creates tension between two equally important public policies under Delaware law. Delaware recognizes “the necessity

for practical and certain procedures in the fair handling of proxies and the expeditious conclusion of corporate elections.”¹ Of equal concern, as explained in *Preston* is a general policy against disenfranchisement.² Resolution of the tension between these policy concerns depends upon the facts of each individual case.

Corporations may generally rely upon their own stock list and recognize votes or proxies when they are initiated by the stockholder of record. Inspectors of elections are entitled to and should be allowed to rely on the face of the proxy to determine who owns the shares: “a proxy valid on its face, that is, one bearing no facial indication that the person executing the proxy was unauthorized” to do so, is “entitled to a presumption of validity.”³

Once challenged, however, the issue becomes the signer’s authority to sign on behalf of the record holder. Here, BBC did challenge the decision to conclude that an officer of HSBC had authority, for HSBC, to sign a FHLBP proxy. Resort to the corporation’s books and records showed HSBC did not appear in a chain of proxies from the record holder, Cede & Co., and had no authority from FHLBP to sign and submit its proxy which had been solicited by a professional solicitation firm. The inspector based his decision to count the votes represented by the

¹ *Williams v. Sterling Oil, Inc.*, Del. Supr., 273 A.2d 264, 265 (1971).

² *Preston v. Allison*, Del. Supr., 650 A.2d 646 (1994).

³ *Mainero v. Microbyx Corp.*, 699 A.2d 320, 325 (quoting *Parshalle v. Roy*, Del. Ch., 567 A.2d 19, 23 (1989)).

FHLBP proxy, signed and submitted by HSBC, on the assumption that because banks and a well-recognized proxy solicitor were involved that he could comfortably assume that all was in order. The inspector confidently declared in his deposition that these assumptions are standard industry practice.

The integrity of the corporate voting process must be maintained. Rules exist to be followed that enhance the efficient, effective and expeditious resolution of corporate elections. These rules do not include the luxury of assuming that banks and professional solicitors do not err and never act without authority. HSBC, to its credit, tried desperately to alert FHLBP to its responsibility as custodian of the unallocated shares. No doubt frustration at no response to its faxes requesting action motivated HSBC to sign the proxy as if it had authority. The face of the proxy clearly shows, however, no legal authority to act on FHLBP's behalf, no link between HSBC and its officer and FHLBP nor any presumptive validity from which one could make such a leap of faith.

I am mindful of the arguments made by Carver.

1. BBC has not shown there *was not* something of record linking FHLBP to HSBC providing HSBC with authority to sign. Carver, without careful attention to our Rule 56(e), believes the Court may assume there might be, thereby creating a genuine issue of material fact.

2. The Court, Carver argues, should rely on the industry standard testified to by an inspector with thirty years experience and deem the proxy “facially valid” even after BBC properly challenged what was more assumption that presumption.

3. Even if “technically” in error, equity should intervene and ignore the election process rules and prevent the disenfranchisement of the unallocated ESOP shares in recognition that Delaware law disfavors disenfranchising shareholders.

Carver’s first argument merits no response. The factual record presented to me and to the inspector at the challenge shows that HSBC had no authority to sign FHLBP’s proxy or to submit it.

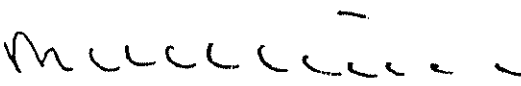
Carver’s second argument fails because even if the “industry standard” is that banks and professional solicitors never lie and never make mistakes and one can always assume this to be a given, here the challenge showed the presumption wrapped in an assumption to be patently wrong. HSBC had no authority to sign on behalf of the record holder, Cede, Banker’s Trust, the holder of Cede’s omnibus proxy, or FHLBP, the custodian of the ESOP and holder of a proxy from Banker’s Trust.

Despite the superficial appeal of Carver’s third argument, ultimately I find it unpersuasive. I recognize that the unallocated shares were counted in accordance with the terms of the ESOP – proportionally as the plan participants voted their

allocated shares. I note that had the rules been followed and FHLBP had responded to HSBC's entreaties and signed and submitted the proxy, the vote would have been counted the same, albeit legitimately. The unallocated shares will not be counted, but only inchoate interests are "disenfranchised." No plan participant loses the opportunity to vote shares he or she owns beneficially.

Therefore, I conclude that to the extent this case presents true "tension" between two important Delaware legal principles, that the policy of favoring "certainty in business records over the general policy of enfranchisement"⁴ prevails.

An Order is attached.



Vice Chancellor

MTS/rm

Encl.

cc: Register in Chancery

⁴ *Maniero*, at 323.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY


IN RE)
)
CARVER BANCORP, INC.) C.A. No. 17743
)

ORDER

Plaintiff having moved the Court, pursuant to Court of Chancery Rule 56, for partial summary judgment on Count V of the Second Amended Complaint, and the Court having heard argument and reviewed the papers thereon;

IT IS HEREBY ORDERED this 24th day of April, 2000 that:

1. Plaintiff's motion for partial summary judgment on Count V of the Second Amended Complaint is granted.
2. The purported consent of Federal Home Loan Bank of Pittsburgh on behalf of 86,382 shares was ineffective.



Vice Chancellor