

LEGAL NOTICES con't

application for a certificate for the conducting of a business under the assumed or fictitious name of D&C Management, with its principal place of business at 900 Fairview Avenue, Waynesboro, PA 17268. The names and addresses or the persons owning or interested in said business is Charles L. Rotz, Jr., 900 Fairview Avenue, Waynesboro, PA 17268 and David A. Rotz, 417 West Seventh Street, Waynesboro, PA 17268.

J.L. Doyle
114 Walnut St., P.O. Box 512
Waynesboro, PA 17268
02/16/96

Notice is hereby given that application was filed on December 22, 1995, with the Secretary of the Commonwealth of Pennsylvania, Harrisburg, Pennsylvania, for the conduct of a business under the assumed or fictitious name of JJG Associates as 4961 Cumberland Highway, Chambersburg, Pennsylvania, 17201, and that the names and addresses of the persons owning or interested in said business are Judith H. Martin of 4961 Cumberland Highway, Chambersburg, Pennsylvania 17201, Janet L. Martin of 85 Dogwood Court, Shippensburg, Pennsylvania 17257, and Glenda K. Martin of 3750 Frecon Road, Chambersburg, Pennsylvania 17201. Law Offices of Welton J. Fischer
550 Cleveland Ave.
Chambersburg, PA 17201
02/16/96

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the commonwealth of Pennsylvania, on February 5, 1996, an application for a certificate for the conducting of a business under the assumed or fictitious name of Rotz Associates, with its principal place of business at 5956 Buchanan Trial East, Waynesboro, PA 17268. The names and addresses or the persons owning or interested in said business is Charles L. Rotz, Jr. and Jocelia M. Rotz, 900 Fairview Avenue, Waynesboro, PA 17268; and David A. Rotz and Helen A. Rotz, 417 West Seventh Street, Waynesboro, PA 17268. J. L. Doyle, Esq.
114 Walnut St., P.O. Box 512
Waynesboro, PA 17268
02/16/96

LEGAL NOTICES con't

NOTICE IS HEREBY GIVEN - Pursuant to the provisions of the Act of Assembly of December 16, 1982, P.L. 1309, and its amendments and supplements, that there was filed with the Secretary of the commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on February 2, 1996, an application for the registration of a business under the fictitious name of Rouzerville Auto Body with its principal place of business at 12169 Pen Mar Road, Waynesboro, Pennsylvania 17268. The names and addresses of the persons interested in said business are: Timothy W. Snively, 12620 Bradbury Avenue, Smithsburg, Maryland 21783 and Tony J. Downin, 11 South Potomac Street, Waynesboro, Pennsylvania 17268. Timothy W. Misner
230 S. Potomac Street, Suite C
Waynesboro, PA 17268-2622
02/16/96

A. DOLORES HESS and A. TRACEY HESS KING, PLAINTIFFS vs HESS MANUFACTURING COMPANY, RAYMOND L. ROCK, its Chairman of the Board of Directors and A. Jeffrey Rock, its President, DEFENDANTS Franklin County branch, Civil Action - Law Equity vol. 8, Page 146

DEMURRER- CORPORATIONS - SHAREHOLDER'S RIGHTS

Defendant corporation demurred to shareholder's complaint for injunctive relief. Plaintiff shareholders sought to inspect certain corporate records and documents. The corporation contended that as preferred stock shareholders without voting rights, plaintiffs were not the type of shareholder who has a right to inspect the material requested and also contended that plaintiffs had not asserted a proper purpose for the inspection. The court dismissed the defendant's objections, holding that the right to examine is given to every shareholder under the Business Corporation Law and that plaintiffs had a right to make a personal inspection in order to, evaluate the management of the corporation.

1. In ruling on a demurrer, the court must admit all well pleaded material facts and reasonable inferences drawn therefrom, and may grant the demurrer only where it is clear that the law will not permit a recovery.
2. The Business Corporation Law, does not distinguish the rights, of shareholders based on either the quantum of shares held or the nature of the rights conferred or withheld by the type or class of shares of stock held.
3. Shareholders seeking corporate records inspection under 15 Pa.C.S.A. 1508(b) in order to determine if the company has taken actions which shareholders allege have had an adverse effect on the company's profitability, thereby reducing dividend income and the value of their stock, have asserted a "proper purpose" under the statute.

*David C. Cleaver, Esq., Attorney for Plaintiffs
John McD. Sharpe, Esq., Attorney for Defendants
Robert L. Freedman, Esq. and Jeffrey S. Edwards, Esq., attorneys for Defendants*

OPINION

William H. Kaye, J., February 7, 1996

A. Dolores Hess and A. Tracey Hess King ("plaintiffs") filed a complaint seeking mandatory injunctive relief against Hess Manufacturing Company, Raymond L. Rock, and A. Jeffrey Rock ("defendants") in the form of an order compelling defendants to permit plaintiffs to inspect certain corporate records and documents. Defendants filed preliminary objections thereto, and plaintiffs filed an amended complaint. Defendants subsequently filed amended preliminary objections which are currently before the Court for resolution after the parties presented briefs and oral argument. The

amended preliminary objections are in the nature of a demurrer to the amended complaint.

A demurrer is a challenge to the pleading which asserts that the pleading is insufficient as a matter of law under any potential theory to state a cause of action. *Balsbaugh v. Rowland*, 447 Pa. 423, 290 A.2d 85 (1972). In ruling on a demurrer, the Court must consider that the demurrer admits all well-pleaded material facts and all reasonable inferences arising therefrom, *Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833 (1976). A demurrer may be granted only where it is clear that the law will not permit a recovery. *Cianfrani v. Commonwealth, State Employees' Retirement Board*, 505 Pa. 294, 479 A.2d 468 (1984). The determination must be based solely upon what is pleaded, *Bonanni v. Weston Hauling*, 392 Pa. 248, 140 A.2d 591 (1958), and not upon matters asserted elsewhere, as in the parties' legal briefs. *Brennan v. Smith*, 6 Cmwlth. Ct. 342, 299 A.2d 683 (1972).

The facts, as asserted in the challenged pleading, are as follows: plaintiffs are the daughters of the late Harold A. Hess, founder of defendant Hess Manufacturing Company ("Hess"). Hess stock is comprised of three (3) classes: 1/ preferred shares, 6% cumulative; 2/ common stock, Class A, voting; and 3/ common stock, Class B, non-voting. In his will, the late Mr. Hess provided for certain dispositions of the stock he owned at the time of his death. As a result of provisions in his will, plaintiff A. Dolores Hess owns 265 shares of Hess preferred stock and 7.618 shares of Class B, non-voting common stock, and is beneficial owner of 64.882 shares of Class B, non-voting stock, currently held in trust by Mellon Bank, N.A., as successor trustee to Girard Bank; plaintiff A. Tracey Hess King owns 7.618 shares of Class B non-voting common stock, and is beneficial owner of 64.882 shares of Class B non-voting common stock held in trust by Mellon Bank, N.A., as successor trustee to Girard Bank and of 326 shares of preferred stock held in trust by Citizens Bank of Southern Pennsylvania.

In their complaint, plaintiffs allege, inter al., that they have concerns about the conduct of Hess Manufacturing Company under its current management, viz. that sales are stagnant and that the company has sustained increasing losses. As a consequence thereof, they aver that the value of the preferred stock they hold, and the common stock held in trust for their benefit, is declining in value, and

may become worthless. They further allege that certain irregularities may exist, including an election of a successor to fill a vacancy in Hess' board of directors without proper notice being given all directors, and the award, without competitive bidding, of a \$1,000,000 construction contract which ultimately involved cost over-runs of \$100,000, to the company owned by a nephew of Hess' president and son of a member of its board of directors. In addition to the foregoing, they aver that they question the payment of deferred compensation to a former president of Hess and the level of compensation to current officers and directors, in light of the apparent decline in sales and profitability of the company.

Plaintiffs attempted to secure access to company records, books, and documents, but defendants declined to grant such access on the ground that plaintiffs are not entitled to the information requested as they are preferred shareholders, and that Mellon Bank, N.A., as trustee, could obtain the information requested. Exhibits attached to the complaint indicate that Mellon Bank, N.A. had requested certain information from Hess in a letter dated June 29, 1993 as trustee of the common stock referred to above, but Hess by letter dated October 15, 1993, indicated that the requested information was not to be divulged to owners of preferred stock, and thus that any information had to be "...kept confidential between Hess Manufacturing and Mellon Bank, N.A." [Amended Complaint, Exhibit "F"].

Upon their failure to secure the requested information voluntarily, the instant action was filed to compel disclosure to plaintiffs, the authority for such relief being asserted as the Pennsylvania Business Corporation Law of 1988, 15 Pa.C.S.A. §1508(b).

Before embarking on a detailed analysis of the matter, we will observe that defendants have challenged plaintiffs' amended complaint on two general grounds: 1/ as preferred shareholders, plaintiffs are not the "type" of shareholder who has a right to examine the matters requested and 2/ plaintiffs have not asserted a proper purpose to examine the matters requested. We will address these matters seriatim.

I. Whether preferred shareholders of a corporation have a right under the Business Corporation Law of 1988 to examine the matters sought.

In their brief, defendants have introduced allusions to the content of the late Mr. Hess' will, and have attached a copy of a will to their brief as an exhibit. Further, they refer to prior litigation regarding the will, and the decision that was made therein. We think it would be improper for us to consider either the will, or that litigation, at this juncture in the case *sub judice*. In ruling on a demurrer, the Court has been instructed on numerous occasions to consider only the facts contained in the pleadings and inferences reasonably deducible therefrom. *Bonanni v. Weston Hauling, supra*, and not from matters asserted in the parties' briefs. *Brennan v. Smith, supra*.

We will turn to the statutory authority asserted by plaintiffs for their position:

§1508. Corporate records; inspection

- (a) Required records.-Every business corporation shall keep complete and accurate books and records of account, minutes of the proceedings of the incorporators, shareholders and directors and a share register giving the names and addresses of all shareholders and the number and class of shares held by each. The share register shall be kept at either the registered office of the corporation in this Commonwealth or at its principal place of business wherever situated or at the office of its registrar or transfer agent. Any books, minutes or other records may be in written form or any other form capable of being converted into written form within a reasonable time.
- (b) Right of inspection.-*Every shareholder shall upon written verified demand stating the purpose thereof, have a right to examine, in person or by agent or attorney, during the usual hours for business for any proper purpose, the share register, books and records of account, and records of the proceedings of the incorporators, shareholders and directors and to make copies or extracts therefrom. A proper purpose shall mean a purpose reasonably related to the interest of the person as a shareholder. In every instance where an attorney or other agent is the person who seeks the right of inspection, the demand shall be accompanied by a*

verified power of attorney or other writing that authorizes the attorney or other agent to so act on behalf of the shareholder. The demand shall be directed to the corporation at its registered office in this Commonwealth or at its principal place of business wherever situated.

- (c) Proceedings for the enforcement of inspection.-If the corporation, or an officer or agent thereof, refused to permit an inspection sought by a shareholder or attorney or other agent acting for the shareholder pursuant to subsection (b) or does not reply to the demand within five business days after the demand has been made, the shareholder may apply to the court for an order to compel the inspection. The court shall determine whether or not the person seeking inspection is entitled to the inspection sought. The court may summarily order the corporation to permit the shareholder to inspect the share register and the other books and records of the corporation and to make copies or extracts therefrom, or the court may order the corporation to furnish to the shareholder a list of its shareholders as of a specific date on condition that the shareholder first pay to the corporation the reasonable cost of obtaining and furnishing the list and on such other conditions as the court deems appropriate. Where the shareholder seeks to inspect the books and records of the corporation, other than its share register or list of shareholders, he shall first establish:

- (1) That he has complied with the provisions of this section respecting the form and manner of making demand for inspection of the document.
- (2) That the inspection he seeks is for a proper purpose.

Where the shareholder seeks to inspect the share register or list of shareholders of the corporation and he has complied with the provision of this section respecting the form and manner of making demand

for inspection of the documents the burden of proof shall be upon the corporation to establish that the inspection he seeks is for an improper purpose. The court may, in its discretion, prescribe any limitations or conditions with reference to the inspection or award such other or further relief as the court deems just and proper. The court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought into this Commonwealth and kept in this Commonwealth upon such terms and conditions as the order may prescribe.

(d) Certain provisions of articles ineffective.-This section may not be relaxed by any provision of the articles.

(e) Cross reference. -See section 1763(c) (relating to certification by nominee).

15 Pa.C.S.A. §1508
[Emphasis added].

Defendants have challenged the applicability of paragraph (b) of the cited statutory authority on the grounds that plaintiffs own only a small number of shares in their own right, and that those shares are non-voting. We do not find that either consideration is relevant to this decision as the statute states unequivocally that "Every shareholder shall...have a right to examine..." [emphasis added].

The Business Corporation Law defines "shareholder" as follows:

"Shareholder." A record holder or record owner of shares of a corporation, including a subscriber to shares. The term, when used in relation to the taking of corporate action, includes the proxy of a shareholder. If and to the extent the articles confer rights of shareholders upon holders of obligations of the corporation or governmental or other entities pursuant to any provision of this subpart or other provision of law, the term shall be construed to include those holders and governmental or other entities.

15 Pa.C.S.A. §1103.

"Shares" is defined in the same section thusly:

"Shares." The units into which the rights of the shareholders to participate in the control of a corporation, in its profits or in the distribution of its assets are defined.

We find nothing in the foregoing language that makes a distinction vis-a-vis the rights to a shareholder under §1508(b) based upon either the quantum of shares held or the nature of the rights conferred or withheld by the type or class of shares of stock held. In particular, it is noted that paragraph (d) of §1508 prevents the relaxation of the section by "any provision of the articles". In our view, this language indicates a legislative intent to protect the rights of shareholders by prohibiting private action to limit the statutory rights set forth in the cited section.

Based on the foregoing, we will deny the demurrer on the ground asserted.

II. Whether plaintiffs have asserted a "proper purpose" for the relief requested.

We reiterate that we are deciding this issue on the procedural context presented, i.e. on defendants' demurrer, from which we must assume as true all allegations of facts contained in the pleading, and all reasonable inference arising therefrom. In that context, we observe the following factual averments: over 80% of the Hess stock is without voting privileges, and all the voting stock is held by the officers and directors of the corporation. Although plaintiffs hold an ownership interest in preferred stock, which is non-voting, and are beneficiaries of stock held in trust for them by Mellon Bank, N.A. and Citizens Bank of Southern Pennsylvania, defendants have taken the position that they cannot have access to records to determine if the company has taken actions which plaintiffs allege have had an adverse effect on the company's profitability, thereby reducing their dividend income and the value of their stock.

In disposing of this issue, we note preliminarily that it is not disputed that plaintiffs properly demanded and were denied inspection of the documents they seek to inspect as required in 15 Pa.C.S.A.

§1508(c). The only question for our resolution is whether the inspection is sought "for any proper purpose". 15 Pa.C.S.A. §1508(b).

We previously noted the factual averments set forth in the complaint which involve claims by plaintiffs regarding actions taken by the Board of Directors of Hess regarding matters of executive compensation, award of a large construction contract with a 10% cost overrun to a company owned by a close relative of a board member, and the company president, and other actions taken at a time when corporate profits have declined, with resultant negative impact on plaintiffs' dividends and equity in the company. In *Zerbey v. J.H. Zerbey Newspapers, Inc.*, 385 Pa.Super. 109, 560 A.2d 191 (1989), Superior Court addressed the issue of shareholders' rights to access of the corporation's records regarding the executive and employee compensation, including salaries, bonuses, pensions, and other remuneration including expenses. Substitute plaintiffs (following death of the original plaintiff) each owned five (5) shares of stock in the corporate defendant which they had inherited from their mother, the original plaintiff. The corporation was a privately-held corporation, with 5,960 of the 6,000 outstanding shares held by the Zerbey Trust of whose trustees four (4) sat on the Board of Directors of the corporation. In her deposition, the original plaintiff had indicated that her purpose in seeking the information was "to determine the nature and extent of certain corporate expenditures which effect [sic] my interest in J.H. Zerbey Newspapers, Inc." She further testified that she wanted to know if the corporation was being properly managed and intimated a suspicion regarding the conduct of the business because she had not been provided information she had requested.

In upholding the trial court's order which directed inspection of the corporate records by plaintiffs, Superior Court ruled that it was sufficient for plaintiffs to aver that "they want to determine whether Zerbey Newspapers is being properly managed in a general sense" and, in particular, whether corporate expenditures for salaries and other compensation conform with industry standards and thus in the best interest of the corporation. 385 Pa.Super. at 124, 560 A.2d at 198.

We find that the instant request is closely analogous to that which met with Superior Court's approval in *Zerbey*. Plaintiffs instantly

have alleged that certain actions were taken by the corporate defendant's board of directors which were improper and which had an adverse effect upon the corporation's profits, and thus upon the dividends available to plaintiffs as shareholders. We note that in *Zerbey* the corporation had independent audits of its actions taken which supported its position that it had acted honestly and appropriately. Superior Court in the following language rejected the motion that even an independent and impartial review of the actions taken by the corporate Board of Directors is a substitute for inspection of corporate records by the shareholders:

[I]t is well established in the legal precedent set forth above that the [plaintiffs] are not bound to accept the statements and opinions of the officers of Zerbey Newspapers, made under oath or otherwise. See *Kuhbach v. Irving Cut Glass Co.*, [220 Pa. 467, 69 A. 981 (1908)].

[Plaintiffs] have a right to make a personal inspection of the records and form their own opinion as to whether they agree that Zerbey Newspapers' expenditures are reasonable or appropriate. [Plaintiffs] have a right to verify, for example, that no bonuses have been paid and that the salaries of corporate officers are not excessive. The fact that [plaintiffs] may ultimately conclude that Zerbey Newspapers has been managed honestly, competently, and reasonably does not derogate from their present right under 15 Pa. S.A. §1308 [Now 15 Pa.C.S.A. §1508].

385 Pa.Super. at 125, 560 A.2d at 199.

Based upon the foregoing analysis, we will deny the demurrer.

ORDER OF COURT

NOW, February 7th, 1996, upon consideration of defendants' preliminary objections, and of briefs submitted and oral argument, the preliminary objections in the nature of a demurrer are hereby DENIED and DISMISSED.

Defendants shall plead to the complaint within twenty (20) days or a default judgment may be entered.

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