

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

GEORGE D. ORLOFF, MADELINE)
ORLOFF, and J.W. ACQUISITIONS, LLC,)
individually and derivatively on behalf of)
WEINSTEIN ENTERPRISES, INC.,)

Plaintiffs,)

v.)

C.A. No. 852-N

LLOYD J. SHULMAN, SYLVIA W.)
SHULMAN, WARD M. LYKE, JR.,)
and GAIL S. KOSTER,)

Defendants,)

and)

WEINSTEIN ENTERPRISES, INC.,)
a Delaware corporation,)

Nominal Defendant.)

MEMORANDUM OPINION AND ORDER

Submitted: January 24, 2005

Decided: February 2, 2005

Stephen E. Jenkins, Esquire, Steven T. Margolin, Esquire, ASHBY & GEDDES,
Wilmington, Delaware; Stuart L. Shapiro, Esquire, Matthew J. Sava, Esquire,
SHAPIRO FORMAN ALLEN MILLER & McPHERSON LLP, New York, New
York, *Attorneys for the Plaintiffs.*

Donald J. Wolfe, Jr., Esquire, Matthew E. Fischer, Esquire, Sarah E. DiLuzio,
Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware;
Joseph P. Augustine, Esquire, NICOLL AND DAVIS LLP, New York, New York,
Attorneys for the Defendants.

LAMB, Vice Chancellor.

This is a suit for corporate waste and breach of fiduciary duty brought individually and derivatively by minority shareholders of Weinstein Enterprises, Inc. The plaintiffs are George D. Orloff, Madeline Orloff, and J.W. Acquisitions, LLC. The complaint alleges that the individual defendants¹ breached their fiduciary duties, by (1) lavishing benefits upon themselves at the expense of Weinstein Enterprises' minority shareholders, and (2) disseminating misleading and incomplete information to the minority shareholders (other than J.W. Acquisitions, LLC) in order to induce them to sell their shares to the corporation at an unfair price.

The defendants have moved to dismiss on the basis of *res judicata*, failure to state a claim upon which relief can be granted, and lack of derivative standing. Briefing on the motion to dismiss is scheduled to be completed shortly. The defendants have also moved to stay discovery pending the decision on the motion to dismiss. This is the court's decision on the motion to stay discovery.

I.

The defendants argue that discovery should be stayed because their motion to dismiss has a valid basis, and if granted would be case dispositive. They also argue that discovery in a first-filed New York action has commenced and is ongoing, and that, therefore, discovery should be stayed in this case.

¹ The individual defendants, all directors of Weinstein Enterprises, are Lloyd J. Shulman, Sylvia W. Shulman, Ward M. Lyke, Jr., and Gail S. Koster.

The plaintiffs respond, correctly, that discovery is not automatically stayed simply because a potentially dispositive motion is pending, that the discovery taken in this case would be useful in the New York action, and that the defendants have not proved that going forward with discovery in this action would be burdensome to them.

II.

The circumstances of this case clearly favor the exercise of discretion in favor of a stay of discovery.

There is no right to stay of discovery, even where a case dispositive motion has been filed.² Instead, whether or not to grant a stay of discovery is within the sound discretion of the trial judge.³ In addition, the moving party bears the burden of proving that a stay of discovery is appropriate under the circumstances.⁴ “[I]n each instance, the court must make a particularized judgment evaluating the weight that efficiency should be afforded (including the extent of the costs that might be avoided) and the significance of any risk of injury to plaintiff that might eventuate from a stay.”⁵ The policy underlying this rule is that the “expense and time

² *Pensionskasse Der ASCOOP v. Random Intern. Holding, Ltd.*, 1993 WL 35977, at *1 (Del. Ch. Jan. 26, 1993); *Kahn v. Tremont Corp.*, 1992 WL 205637, at *2 (Del. Ch. Aug. 21, 1992).

³ Del. Ch. Ct. R. 26(c); *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (Del. 1986); *see also Wallace v. Durwood*, 1993 WL 455307, at *3 (Del. Ch. Nov. 2, 1993) (noting that Ch. Ct. R. 26© grants the court authority to stay discovery).

⁴ *Pensionskasse*, 1993 WL 35977, at *1.

⁵ *In re McCrory Parent Corp.*, 1991 WL 137145, at *1 (Del. Ch. July 3, 1991).

necessary for discovery may be avoided if the motion is granted within a reasonable time.”⁶

Former Chancellor Allen’s decision, in *In re McCrory*, discussed three “special circumstances” that might justify denying a stay of discovery despite the pendency of a motion to dismiss. These are: (1) where the motion does not offer a “reasonable expectation” of avoiding further litigation, (2) where the plaintiff has requested interim relief, and (3) where the plaintiff will be prejudiced because “information may be unavailable later.”⁷

None of these circumstances is present here. In this case, if the motion to dismiss is granted, the entire case may be disposed of. Moreover, the plaintiffs have not requested interim relief, and there is no showing that information relevant to this action may be unavailable if discovery is delayed for the brief period required to hear and decide the dismissal motion. In addition, the plaintiffs’ discovery requests are broad and potentially burdensome. The plaintiffs served interrogatories and document requests that are quite expansive, both in terms of the information or documents requested and the time period covered. For example, document request No. 15 seeks “all documents referring or relating to . . . all real estate owned or leased by Weinstein [Enterprises] . . . including, without limitation all purchase agreements, all leases, all other arrangements with third parties . . .

⁶ *Stotland v. GAF Corp.*, 1983 WL 21371, at *3 (Del. Ch. Sept. 1, 1983).

⁷ *McCrory*, 1991 WL 137145, at *1.

including leases without regards to date” Weinstein Enterprises is in the business of owning and leasing real estate, and it would undoubtedly encounter a substantial burden in complying with this and other aspects of the discovery propounded by the plaintiffs. In the circumstances, the interests of justice will be promoted by deferring discovery until the motion to dismiss is resolved and the scope and nature of the claims properly asserted in this case is determined.

III.

For these reasons, the defendants’ motion to stay discovery pending resolution of the motion to dismiss is granted. **IT IS SO ORDERED.**