

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA
METRO ATLANTA BUSINESS CASE DIVISION**

BERNARD BRONNER, derivatively on
behalf of Rainforest Productions Holdings,
Inc. and directly on behalf of himself,

Plaintiff,

v.

ROBERT E. HARDY, II and WILLIAM E.
PACKER, JR.

Individual Defendants,

and

RAINFOREST PRODUCTIONS
HOLDINGS, INC.,

Individual and Nominal Defendant.

CIVIL ACTION FILE
NO. 2022CV363576

**ORDER ON DEFENDANTS' MOTION FOR APPROVAL OF
SETTLEMENT AGREEMENT**

Before the Court is Defendants' Motion for Approval of Settlement Agreement, filed November 7, 2023 ("Motion"). Having considered the record and submissions of counsel including Plaintiff Bernard H. Bronner's Memorandum of Law in Opposition to Motion, filed on November 23, 2023 and Defendants' Reply

in Further Support of Motion, filed November 27, 2023, the Court enters the following order.

1. BACKGROUND

1.1 Case History

The present matter is a renewal action. The convoluted history of this dispute is outlined in the Order on Motions for Summary Judgment, entered June 5, 2023. (Ord. on Mots. for Summ. J. 3-11.) Summarily stated, this action is a business dispute involving the three primary shareholders of Rainforest Production Holdings, Inc. (“Rainforest”). Plaintiff Bernard Bronner owned 30.795% of Rainforest shares and the two individual Defendants Robert E. Hardy, II and William E. Packer, Jr. (the “Founders”) owned 63.6%. (Mot. Ex. I 1.) The remaining roughly 5% of the shares were owned by several individuals who are not parties to this lawsuit with the largest of such shareholders owning 1.67% of Rainforest shares. (Id.)

Over the company’s history, the three primary Rainforest shareholders battled over operational and financial issues which they attempted to resolve via an October 8, 2010 Shareholders Reconciliation Agreement (“Reconciliation Agreement”). Rainforest Prod. Holdings, Inc. v. Bronner, Nos. A19A1684, A19A2157 (Ga. App., Mar. 4, 2020) at 5. However, their disputes continued, and Rainforest was dissolved after a June 2, 2014 special meeting called by the Founders. Id. at 7-8. On June 20, 2014, Plaintiff commenced Bernard H. Bronner v. Robert E. Hardy, II et al., Civil

Action File No. 2014CV248023 (the “Prior Action”). Id. In the Prior Action, the Plaintiffs’ claims were refined through amended pleadings, a series of dispositive motions, and appellate review. (See generally Ord. on Mots. for Summ. J. 8-9.) After the Prior Action had been pending for over seven years, all parties dismissed their claims and counterclaims on the eve of a November 2021 specially set trial.

Plaintiff filed this renewal action on April 18, 2022. Again, Plaintiff’s claims were refined through a series of motions including a motion to dismiss and cross motions for summary judgment. (See generally id. 9-10, 26-27.) On June 29, 2023, after completion of the discovery and motions phase, the Court entered a Consolidated Pre-Trial Order (“PTO”). Plaintiffs’ remaining claims against Defendants include a direct claim for breach of contract against Rainforest regarding whether Rainforest failed to establish Year-End Bonus Pools as required in § 2.5 of the Reconciliation Agreement. (PTO ¶ 8, Compl. ¶¶ 93-97.)¹ Plaintiff is also pursuing derivative claims against Hardy and Packer alleging they breached their fiduciary duties, misappropriated corporate opportunities, laid waste to corporate assets, and breached § 2.3 of the Reconciliation Agreement which addresses compensation the Founders received from third parties. (Id.; Compl. ¶¶ 99-115.) The matter was specially set for trial to begin December 4, 2023.

¹ The Court granted Defendants summary judgment on Plaintiff’s direct claim for breach of § 1.6 of the Reconciliation Agreement. (Ord. on Mots. for Summ. J. 22-24.)

1.3 Non-Party Shareholders Adopt Settlement Agreement

Unbeknownst to Plaintiff, sometime in the fall of 2023 the Founders and Rainforest commenced an effort to settle Plaintiff's derivative claims against Rainforest. They formulated a November 3, 2023 settlement agreement whereby \$250,000 would be paid to Rainforest and Rainforest would then release any and all claims against the Founders ("Settlement Agreement").² The only evidence in the record concerning the Settlement Agreement is found in the Affidavit of Terreé A. Wakefield ("Wakefield Affidavit"), filed November 7, 2023. She was appointed to serve as Rainforest's Trustee at the time of its dissolution. (Wakefield Aff. ¶ 2.) She avers the terms of the Settlement Agreement were presented to those Rainforest shareholders who are not parties to this suit ("Non-Party Shareholders") for approval via written consent in lieu of a shareholder meeting. (Id. ¶ 6.) She further avers a majority of the Non-Party Shareholders granted such approval. (Id.)

The instant Motion seeking approval of the Settlement Agreement was filed November 7, 2023. As part of their requested relief, Defendants asked that the December 4, 2023 specially set trial be delayed until the Court ruled on the Motion. (Mot. 1.) The trial was subsequently continued.

² A copy of the Settlement Agreement is Exhibit I to the Motion.

2. STANDARD OF REVIEW

A trial court's decision to dismiss shareholder derivative claims pursuant to a settlement agreement will be reviewed for an abuse of discretion. Stephens v. McGarrity, 290 Ga. App. 755, 761 (2008).

3. ANALYSIS

Defendants filed this Motion pursuant to O.C.G.A. § 14-2-745 which provides,

[a] derivative proceeding may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given to the shareholders affected.

Moreover, the Settlement Agreement expressly states its "validity and enforceability . . . are conditioned upon receiving approval by the Court." (Mot. Ex. I, ¶ 1.)

Defendants offer three arguments as to why the Court's approval is merited.

First, Defendants contend the Settlement Agreement, approved by the Defendants and a majority of the Non-Party Shareholders, is an enforceable contract and for this reason alone the Court should approve it. (Id. ¶ 9.) Defendants argue, "[w]hile there is a dearth of authority interpreting O.C.G.A. §14-2-745, other states have dismissed derivative claims when they are subject to a valid settlement agreement." The one decision cited by Defendants, a 2005 Wyoming decision, is inapposite. (Id.) See Mueller v. Zimmer, 2005 WY 156 ¶ 18, 124 P.3d 340, 350-

351 (Wyo. 2005). Mueller did not concern an agreement to settle a derivative claim but a derivative claim contesting a company's board of directors' decision to settle payment disputes with former employees on which derivative claim the trial court granted summary judgment for defendants. Id. at 348-351. Contrary to Defendants' assertion, the Court finds its role in approving the settlement of derivative claims requires more than determining whether a proposed settlement agreement contains all the elements of an enforceable contract.

Second, Defendants assert the Settlement Agreement "is entitled to protection under the business judgment rule," citing O.C.G.A. §§ 14-2-861 and 14-2-863. (Id. ¶ 10.) Specifically, Defendants contend the decision of the Founders to settle the derivative claims was a conflicting interest transaction that, after notice, received approval by a majority of disinterested shareholders. (Id.) Accordingly, Defendants argue, this Court has no power to enjoin the Settlement Agreement or set it aside. (Id.) See generally O.C.G.A. § 14-2-861(b)(2). Assuming without deciding this was a properly approved conflicting interest transaction, the Court finds Defendants' argument misplaced.

The Georgia Assembly has enacted two particular provisions that govern the dismissal, discontinuance, or settlement of a derivative action, and both require court approval. O.C.G.A. §§ 14-2-744 (dismissal of derivative proceeding on the motion of a corporation) and 14-2-745 (discontinuance or settlement of a derivative

proceeding). As outlined in Montgomery Cty. v. Hamilton, 337 Ga. App. 500, 507 (2016),

[w]hen there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision (punctuation omitted).

Here, the General Assembly has enacted specific statutes empowering a trial court to approve the dismissal, discontinuance, or settlement of a derivative action. Therefore, the Court rejects Defendants' argument that their alleged compliance with O.C.G.A. §§ 14-2-861 and 14-2-863 prohibits the Court from conducting its own independent review of the Settlement Agreement. (Mot. ¶¶ 10-11.)

Finally, with little analysis, Defendants contend the Settlement Agreement is "fair to Rainforest" and urge the Court to approve the Settlement Agreement and countenance the dismissal of Plaintiff's derivative claims pursuant to O.C.G.A. § 14-2-745. (Mot. ¶¶ 11-12.) The Court finds a number of problems with this argument. First, Defendants fail to acknowledge or address the interplay between this statute and O.C.G.A. § 14-2-744. O.C.G.A. § 14-2-744 outlines when a Court may dismiss a derivative proceeding on the motion of a corporation, which is implicated here as Rainforest has signed onto the Motion. (Mot. 1.) In pertinent part, it provides:

(a) The court may dismiss a derivative proceeding if, on motion by the corporation, the court finds that one of the groups specified in subsection (b) of this Code section has made a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation. The corporation *shall* have the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation.

(b) The determination in subsection (a) of this Code section *shall* be made by:

(1) A majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum;

(2) A majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors constitute a quorum; or

(3) A panel of one or more independent persons appointed by the court upon motion by the corporation (Emphasis added).

Here, the Non-Party Shareholders who approved the Settlement Agreement are not among the decision makers mandated by subsection (b) the statute.

Even if the Non-Party Shareholders were statutorily empowered to make the decision, the Court finds Defendants have failed to discharge their evidentiary burden regarding the process that led to approval of the Settlement Agreement. Stephens, supra, the first appellate opinion construing O.C.G.A. § 14-2-745, concerned a similar situation where a trial court was asked to approve the settlement of a derivative action that would result in its dismissal. Id. at 759-760. In reviewing

the trial court's decision under O.C.G.A. § 14-2-745, the Court of Appeals applied the general precepts of O.C.G.A. § 14-2-744 determining,

a trial court 'may dismiss a derivative proceeding' if it finds that an independent body or individual 'has made a determination in good faith after conducting a reasonable investigation . . . that the maintenance of the derivative suit is not in the best interests of the corporation.'

Id. at 760.

Here, the Non-Party Shareholders who approved the Settlement Agreement constitute approximately 5% of Rainforest ownership, and this Court has misgivings about the outsized role this small percentage of Rainforest shareholders played in the approval process. Even if the Court were to set aside these misgivings, it is still not persuaded to approve the Settlement Agreement.


The cursory evidence provided by Defendants about the approval process makes it impossible for the Court to conclude it was conducted in good faith or that the decision to approve the Settlement Agreement was the product of a reasonable investigation. (See generally Wakefield Aff.) Foremost among the Court's concerns, Plaintiff contends and Defendants do not deny that he was not informed of the investigation and had no direct opportunity to offer input regarding the evidence he has garnered or his assessment of damages. (Resp. 9, 12, n. 9; Reply 5.) Considering the long litigation process that preceded this Settlement Agreement, the failure to provide the Plaintiff with a meaningful opportunity to present his claim

to the body charged with evaluating the Settlement Agreement suggests the investigation was not independently or reasonably conducted.

4. CONCLUSION

In light of all the foregoing, the Defendants' Motion for Approval of Settlement Agreement is **DENIED**. The Court specially sets the trial of this matter for **September 16, 2024 beginning at 9:00 a.m. in Courtroom 8B**. Based upon the peculiar length and history of this dispute, the Court will not consider any additional motions seeking Court approval to settle Plaintiff's derivative claims pursuant to O.C.G.A. § 14-2-745.

IT IS SO ORDERED this 24th day of June, 2024.



Kelly Lee Ellerbe, Judge
Fulton County Superior Court
Atlanta Judicial Circuit
Metro Atlanta Business Case Division

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