UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,Appellate Division.
Richard JOSEPH, Plaintiff-Respondent,
v.
EDISON CONTROL CORPORATION, Alan J. Kastelic, William B. Finneran, Robert L. Cooney and William C. Scott, Defendants-Appellants.
Argued Jan. 31, 2006.
Decided July 21, 2006.

SYNOPSIS

On appeal from Superior Court of New Jersey, Chancery Division, Mercer County, C-91-03.

Gregory A. Markel (Cadwalader, Wickersham & Taft) of the New York bar, admitted pro hac vice, argued the cause for appellants (Wilentz, Goldman & Spitzer, James E. Tonrey, Jr. and Mr. Markel, attorneys; Jason M. Halper, Patricia F. Zoccolillo and Mr. Markel, on the brief).
Frank P. **DiPrima** argued the cause for respondent (Ronald A. Brown, Jr., of the Delaware bar, admitted pro hac vice, of counsel; Mr. **DiPrima**, on the brief).

Before Judges COBURN, COLLESTER and S.L. REISNER.

PER CURIAM.

***1** On August 6, 2003, plaintiff Richard Joseph filed a class action suit on behalf of former minority shareholders of **Edison Control** Corporation (Edison) alleging that they were frozen out in an abusive going-private transaction in violation of *N.J.S.A.* 14A:7-13 by Edison and its four directors, defendants William B. Finneran, Alan J. Kastelic, Robert L. Cooney and William C. Scott.

Edison is a New Jersey corporation with its principal executive office located in Port Washington, Wisconsin. It also has facilities in Grafton, Wisconsin; Gardena, California; Houston, Texas; and in Wales and Malaysia. It operates several businesses including the design, manufacture and distribution of construction forms for concrete piping systems, the manufacture of abrasion-resistant pumping systems and the distribution of industrial hose and fittings. Prior to the subject transaction, Edison had 1,638,595 shares of common stock outstanding, which were publicly traded on the OTC Bulletin Board under the symbol EDCO. At the time of the reverse-split transaction, the company was financially sound and profitable. For the fiscal year ending January 31, 2003, Edison had $27.4 million in net sales, $2.5 million in operating income and $1.14 million in net income. The shareholders' equity or book value was $20.1 million or $12.28 per share.

Defendant Finneran is Chairman of the Board and a director. Prior to the reverse-split, he owned 1,096,978 shares or sixty-seven percent of Edison stock. Defendant Kastelic, CEO and a director, owned 66,667 shares or four percent of the company's outstanding common stock. Defendants Cooney and Scott were the other two directors. In March 2003, Finneran and Kastelic delivered a letter to the Edison board proposing that the company go private via a 66,667-for-one reverse stock split whereby all shareholders who owned 66,666 or fewer shares, that is, all but Finneran and Kastelic, would receive $6.50 per share for their stock. Cooney and Scott were appointed as a special committee to consider and negotiate the proposal. They then retained Schroeder & Co. as a financial advisor to assess the value of Edison.

Relying on two separate methodologies to assess value and applying discounts for a minority interest and lack of marketability, Schroeder derived a valuation range for Edison's public minority shares of $3.55 to $7.76 by an enterprise value analysis and an evaluation of $4.76 to $7.75 by a discounted cash flow analysis. Because the Board had repurchased more than one million shares over the prior year at $7 per share, the special committee recommended raising the price to $7 a share. The Board approved the reverse-split transaction at $7 a share conditioned upon a vote of the shareholders other than Finneran and Kastelic. The shareholders approved the transaction on July 31, 2003.

Plaintiff's complaint filed in the Chancery Division, Mercer County, challenged the discounts for minority shares in arriving at the valuation of $7 a share; the fairness of the price; alleged misstatements and admissions in the disclosure soliciting the vote; and Schroeder's independence. Judge Neil H. Shuster referred the case to mediation on February 11, 2004, after some discovery had been completed. Lewis J. Pepperman, Esq., was the mediator selected by mutual consent of the parties.

***2** The first mediation conference was held on March 8, 2004, with only attorneys present for the purpose of ascertaining whether it would be fruitful to schedule another conference at which the clients with settlement authority would attend. After concluding that settlement was possible, Pepperman scheduled a second conference on April 26, 2004. Counsel present for the second conference were James E. Tonrey, Jr., Esq., of Wilentz, Goldman & Spitzer, P.A., local counsel, and Jason Halper, Esq., of the New York law firm Cadwalader, Wickersham & Taft, LLP, (CWT), pro hac vice lead counsel, for defendants; and for plaintiff, Ronald A. Brown, Jr., Esq., pro hac vice of the Delaware firm of Prickett, Jones & Elliot, P.A. Also in attendance were plaintiff and Finneran, who had undisputed authority to settle the matter on behalf of all defendants.

At one point during the session Pepperman called Judge Shuster to advise him that the parties were making progress in their negotiations and a settlement was possible. Later that day another call was placed from Pepperman's office to Judge Shuster. Using a speakerphone, the parties told Judge Shuster that the case had been settled for the sum of $1.5 million with defendants' agreeing not to contest the class certification. Judge Shuster asked whether the settlement would be placed on the record and was advised that it would not be necessary. The phone conversation lasted only a minute or two.

Two days later on April 28, Pepperman wrote a letter to the court with copies to each counsel stating:

This letter is to confirm that this matter has been settled for the sum of $1,500,000.00. It is my understanding that counsel will now proceed with preparing the necessary papers for dealing with the Class Certification issues. Thank you for giving me the opportunity to be of service to you in this matter.

Pepperman enclosed his final bill as well as an evaluation and feedback form to the parties.

On April 29, 2004, Patricia F. Zoccolillo, Esq., of CWT emailed Brown, counsel for plaintiff, inquiring whether depositions scheduled for the following day would still take place. Brown responded, “The case is settled.” There was no response from CWT.

Furthermore, also on April 29, 2004, three days after the mediation session, Brown transmitted drafts of a stipulation and agreement of settlement along with a notice to class members and a form of final judgment order to Halper at CWT with copies to his associate, Mara Aaronson, Esq., Tonrey, of the Wilentz firm, and Frank **DiPrima**, Brown's co-counsel. The email transmittal letter stated in part,

Jason, attached is a draft of the Stipulation of Settlement (including exhibits) in the Edison case. This document was pretty much copied from a class settlement stipulation we did in another reverse-split cash-out case we settled earlier this year which was also settled for a cash payment. That settlement was approved by a Delaware court so we think this is a good set of papers.

***3** ...

I would appreciate it if you would get me your comments as soon as possible.

There was no response. Halper later certified that he had never received the email or attached documents. However, local counsel Tonrey of the Wilentz firm did not deny receipt.

Brown did not hear from Halper or any other attorney at CWT until May 18, 2004, when Halper left a voicemail message saying, “Certain issues have arisen and we are not going to move forward on a settlement of this action.”When Brown called back, Halper said that the decision was due to “carrier issues.” Halper made a similar phone call to the mediator on the same date with the same information.

On May 28, 2004, plaintiff moved to enforce the settlement agreement reached on April 26, 2004. After briefing and oral argument on July 9, 2004, Judge Shuster issued a written opinion on August 5, 2004, in which he granted plaintiff's motion. He found that there was a valid and binding oral settlement as shown by the undisputed facts of the contents of the conference call on April 26, 2004, the

mediator's letter confirming the settlement and Brown's email of draft settlement documents submitted within three days. He found that the essential terms of settlement were reached in mediation, to wit, (1) the settlement amount of $1.5 million; (2) the class action certification; and (3) counsel fees. He further stated for the record that no representation was made to him that the oral settlement was subject to a subsequent written agreement. He specifically found that the only essential term of the settlement was the dollar amount of $1.5 million and that the remaining terms were pro forma or subject to the court's eventual ruling.

Judge Shuster denied defendants' motion for a stay of the enforcement order on August 26, 2004, and we denied defendants' motions for leave to appeal and for a stay on September 22, 2004. Thereafter, on October 5, 2004, defendants moved for Judge Shuster's recusal, contending that he had "personal knowledge of disputed evidentiary facts concerning the proceeding," based on his receipt of the conference call on April 26, 2004, and that he was likely to be a witness. After oral argument on November 19, 2004, Judge Shuster denied defendants' motion for recusal because there were no disputed facts as to what was said during the conference call and defendants neither contended that the court was biased nor gave any reason that would preclude a fair hearing. Judge Shuster added that defendant's recusal motion was, in essence, an indirect way to seek reconsideration, which Judge Shuster also denied.

After careful consideration of the record and the briefs of counsel, we affirm substantially for the reasons stated in Judge Shuster's August 5, 2004, statement of reasons granting plaintiff's motion to enforce the settlement agreement and his oral opinion of November 19, 2004, denying defendants' motion for his recusal.

Affirmed.

N.J.Super.A.D.,2006.
Joseph v. Edison Control Corp.
Not Reported in A.2d, 2006 WL 2033666 (N.J.Super.A.D.)

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