STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM D. MCMASTER,

Plaintiff-Appellant,

v

MICHIGAN NATIONAL CORPORATION, DANIEL T. CARROLL, JOHN S. CARTON, DOUGLAS E. EBERT, SIDNEY E. FORBES, SUE L. GIN, MORTON E. HARRIS, GERALD B. MITCHELL, ROBERT J. MYLOD, WILLIAM F. PICKARD, STANTON KINNIE SMITH, JR., WALTER H. TENINGA, STEPHEN A. VAN ANDEL, RICHARD T. WALSH, JAMES A. WILLIAMS, and LAWRENCE L. GLADCHUN,

Defendants-Appellees.

UNPUBLISHED
April 24, 1998

No. 193107
Oakland Circuit Court
LC No. 95-505596-CZ

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

In this action to compel an annual shareholders meeting, plaintiff appeals as of right from a January 17, 1996 order of the Oakland Circuit Court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings.

I

Plaintiff was the owner of ten shares of common stock of Michigan National Corporation (MNC) from 1991 until November 2, 1995. Plaintiff filed this action on October 5, 1995, to compel MNC to hold its 1995 annual meeting, as required by MCL 450.1402; MSA 21.200(402) of the Michigan Business Corporation Act and MNC's bylaws. MNC's bylaws state that its annual meeting was to be held on the second Tuesday of each April. The 1994 annual meeting took place as scheduled on the second Tuesday of April; however, MNC never held an annual meeting in 1995. Rather, MNC held a special meeting on June 2, 1995 for the purpose of obtaining shareholder approval

of a proposed merger with National Australia Bank, Ltd. At the June 2, 1995 meeting, the shareholders approved the merger. Defendants assert that the Board of Directors, on July 10, 1995, designated November 30, 1995 as the date of the 1995 annual meeting, provided that the merger did not occur before that date. The merger actually occurred on November 2, 1995, thus, no annual meeting was ever held in 1995.

Plaintiff also filed suit to require MNC to distribute its annual report for fiscal year 1994 to shareholders as required by MCL 450.1901; MSA 21.200(901). Defendants contend that the annual report for fiscal year 1994 was mailed to all shareholders in April 1995. Plaintiff, however, denied ever receiving an annual report.

As a result of the merger, all outstanding shares of MNC stock were canceled and converted into the right to receive $110 a share. National Americas Holdings, Ltd., a subsidiary of National Australia Bank, became the sole shareholder of MNC. Therefore, plaintiff ceased to be a shareholder of MNC on November 2, 1995.

Defendants filed a motion for summary disposition in the trial court pursuant to MCR 2.116(C)(10). Defendants argued that they were entitled to summary disposition because plaintiff was no longer a shareholder of MNC, and because the new sole shareholder of MNC executed a written consent pursuant to MCL 450.1407; MSA 21.200(407) adopting a resolution designating the Board of Directors and, therefore, there was no need for an annual meeting. The trial court granted defendants' motion for summary disposition in an order dated January 17, 1996.

II

On appeal, plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition with respect to the annual meeting. Plaintiff notes that MCL 450.1402; MSA 21.200(402) does not provide for any exception to not hold an annual meeting, and that defendants failed to support their argument that plaintiff's statutory shareholder rights may be waived by a voluntary merger after the filing of a complaint to enforce those statutory rights. Defendants argue that plaintiff's loss of his shareholder status precludes his pursuit of this claim because even if an annual meeting were now held, plaintiff would have no right to attend. Defendants also argue that MNC's obligation to hold its annual meeting was satisfied through the written consent procedure.

MCL 450.1402; MSA 21.200(402) provides the following:

> An annual meeting of shareholders for election of directors and for such other business as may come before the meeting shall be held at a time as provided in the bylaws, unless such action is taken by written consent as provided in section 407. Failure to hold the annual meeting at the designated time, or to elect a sufficient number of directors at the meeting or any adjournment thereof, does not affect otherwise valid corporate acts or work a forfeiture or give cause for dissolution of the corporation, except as provided in section 823. If the annual meeting is not on the date designated therefor, the board shall cause the meeting to be held as soon thereafter as convenient.

> If the annual meeting is not held for 90 days after the date designated therefor, or if no date has been designated for 15 months after organization of the corporation or after its last annual meeting, the circuit court of the county in which the principal place of business or registered office of the corporation is located, upon application of a shareholder, may summarily order the meeting or the election, or both, to be designated in the order. At any such meeting ordered to be called by the court, the shareholders present in person or by proxy and having voting powers constitute a quorum for transaction of the business designated in the order.

The statute clearly states that the annual meeting *shall* be held at the time as provided for in the bylaws. Further, the bylaws provided that the annual meeting of the shareholders *shall* be held on the second Tuesday of April, or as long as fifteen months after the 1994 annual meeting. It is undisputed that no annual meeting was ever held in 1995, much less on the second Tuesday of April. In this case, it is clear that both the statute and the bylaws were violated when no annual meeting was held in 1995, especially considering the mandatory language of both provisions. See *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994) (the use of the term "shall" rather than "may" indicates mandatory rather than discretionary action). As plaintiff correctly notes, there is no exception contained in the statute that would exempt an annual meeting.

We cannot accept defendants' argument that MNC's obligation to hold it annual meeting was satisfied through the written consent procedure. Pursuant to MCL 450.1407(2); MSA 21.200(407)(2), any action required by the act to be taken at an annual meeting of shareholders may be taken without a meeting if, before or after the action, all the shareholders entitled to vote consent in writing. In this case, MNC received a unanimous written consent from its sole shareholder National Americas Holdings, Ltd. on November 16, 1995. Although it is permissible under MCL 450.1407(2); MSA 21.200(407)(2) to obtain written consent to waive the annual meeting after the meeting should have been held, MNC could not obtain such consent from one that was not a shareholder at the relevant time. In other words, MNC circumvented the clear dictates of MCL 450.1402; MSA 21.200(402) by obtaining consent from a shareholder different from those who were entitled to attend the annual meeting that should have been held in April. We cannot allow National Americas Holdings, Ltd. to "consent" to a waiver of the annual meeting after it obtained its status as sole shareholder, thereby depriving the previous shareholders of their rights under MCL 450.1402; MSA 21.200(402). Most importantly, we further note that there is certainly no indication in the record that the shareholders in existence before National Americas Holdings, Ltd. gave their proxy to National Americas Holdings, Ltd. to vote on their behalf.

Accordingly, we hold that there is no valid written consent in this case in conformance with MCL 450.1407(2); MSA 21.200(407)(2). National Americas Holdings, Ltd. could not purport to waive the rights of shareholders who existed at the time that the annual meeting should have been held.

We also reject defendants' argument that plaintiff's loss of his shareholder status precludes his pursuit of this claim. When plaintiff filed this action in the circuit court on October 5, 1995, he was a shareholder of MNC. It was not until November 2, 1995, that plaintiff ceased to become a shareholder

of MNC. Pursuant to MCL 450.1489; MSA 21.200(489), a shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors are illegal, fraudulent, or willfully unfair and oppressive to the shareholder. When this suit was filed, plaintiff was a shareholder of MNC. It was only after the suit was filed, requesting that an annual shareholders meeting for 1995 be held, that plaintiff was divested of his shares in MNC. Therefore, because plaintiff was a shareholder when he instituted this suit, the subsequent action divesting him of his shares does not operate to divest him of his shareholder rights that he had at the time that the suit was filed.

Moreover, MCL 450.1402; MSA 21.200(402) provides that the failure to hold the annual meeting does not affect otherwise valid corporate acts. Here, there is no claim that the merger is otherwise invalid, and indeed, the merger was approved by the shareholders at a special meeting. Therefore, we remand this case to the circuit court with special instructions that the Board of Directors shall, under oath, provide answers to any questions put before them by any persons who were shareholders of MNC before the merger on November 2, 1995. Although the remedy in this case is somewhat difficult to fashion, we find this to be the most equitable remedy since MNC has clearly circumvented the dictates of MCL 450.1402; MSA 21.200(402) by failing to hold an annual meeting for 1995.

III

Plaintiff also contends that MNC failed to provide him with a 1994 annual report. Defendants state that the annual report for fiscal year 1994 was mailed to all shareholders in April 1995.[1] Plaintiff, however, denied ever receiving an annual report. MCL 450.1901; MSA 21.200(901) requires a corporation to distribute a financial report to each shareholder for each financial year. We are unable to determine with certainty whether plaintiff ever received the 1994 annual report. On remand, we simply direct MNC to ensure that plaintiff has received the 1994 annual report and that if plaintiff has not received one, then one shall be provided to him. If plaintiff has already received the 1994 annual report, then no further remedy is required.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Helene N. White

[1] We note that a 1994 annual report has been attached to defendants' appellate brief. Thus, it should be simple to provide the report to plaintiff.