1987 WL 758584
Only the Westlaw citation is currently available.

Court of Chancery of Delaware.

ATLANTIC RESEARCH CORPORATION, Plaintiff,
v.
CLABIR CORPORATION, Defendant.
CLABIR CORPORATION, a Delaware corporation, and General Defense Corporation, a Pennsylvania corporation, Counterclaim Plaintiffs,
v.
ATLANTIC RESEARCH CORPORATION, et al., Counterclaim Defendants.

No. CIV.A. 3783.
|
Feb. 10, 1987.

RULING OF THE COURT ON PLAINTIFF AND CERTAIN COUNTERCLAIM DEFENDANTS' MOTION FOR DISCOVERY OF MERIDIAN BANK AND CITIBANK

JACOBS, Vice Chancellor.

***1** THE COURT: Gentlemen. I thought that it would be the best course of action to render a decision now because I am not certain that with the passage of time what I have to say would be any clearer or would serve the interests of the parties.

Secondly, I would say by way of preface that the ruling I am about to announce is, as Mr. Lamb indicated, somewhat in the abstract since I don't really have before me any particular types of documents or any particular specific discovery issue that requires a ruling on any specific matter. And therefore, basically what I am going to be doing is to state in a somewhat abstract way the ground rules under which the discovery that is being sought and which is being opposed should take place.

Clabir has expressed an interest in some business combination with Atlantic Research, and without going through an extensive review of the facts, all of which has been better done in the briefing, it is correct to say that Atlantic did not share that interest and as a partial response adopted a so-called poison pill. At about the same time that Atlantic adopted, or I should say its directors adopted, the poison pill, they caused Atlantic to file in this court an action for declaratory judgment that the poison pill is valid under Delaware law and in that action named Clabir as a defendant.

Clabir counterclaimed, alleging, I believe, six claims by way of counterclaim and, by way of summary, contended that the adoption of the pill constituted a breach by Atlantic's directors of their fiduciary duties, as well as a violation of the rights of Atlantic shareholders in various respects, including their right to receive an offer even if opposed by the Atlantic board as well as their right to alienate their stock.

Atlantic is attempting to take discovery of Clabir's financing sources; namely, Citibank and Meridian Bank. Atlantic seeks information relating to Clabir's ongoing strategies and plans as well, I am told, as information that falls outside that particular category; that is, information that is also not related to ongoing strategies and plans but falls in different categories.

Clabir opposes this attempted discovery on two grounds. First, it claims that the discovery being sought is irrelevant in the sense that it is not calculated to lead to the discovery of admissible evidence. Second, Clabir argues that the discovery being sought violates the so-called business strategy privilege.

In response, Atlantic claims that the discovery that it seeks from the two banks is relevant because it tends to confirm the reasonableness of the threat that the Atlantic directors concluded would be posed by Clabir.

In my opinion, while that argument is logically true, it is not in technical terms legally relevant, because the decision of the Atlantic directors as to whether and the extent to which Clabir constituted a threat, and the need to adopt the pill in response, is a decision the validity of which has to rise or fall on what the directors knew and considered at the time that they adopted the pill, and should not be considered on the basis of what they did not know and what they did not consider.

***2** However, there is a relevance of the information that is being sought, but the relevance arises in a way that is different from the characterization given to it by Atlantic. As I see it, the relevance is conditional and in some way contingent. If Clabir were to attack the reasonableness of the board's decision at the trial on the basis that the directors' perceptions of Clabir's intention were objectively incorrect, then Atlantic would be entitled to test what Clabir's true intentions were; that is to say, Atlantic would be entitled to test the validity or the truth of what Clabir claimed that its intentions were by way of rebuttal.

If the banks have documents or other evidence bearing on what Clabir's intentions were, then on that basis, conditional and contingent as it may be, it would be relevant at least in the sense that that term is used under Rule 26. So on that basis I cannot say on this record that the discovery being sought would not lead to admissible evidence.

However, the relevance of certain of that information-namely, the ongoing plans and strategy, the ongoing and future plans and strategy of Clabir-is, in my opinion, outweighed by the prejudice that would result to Clabir if that information is disclosed at this time. The same policy that would protect the disclosure, the forced disclosure of that information if it were sought from the target, in this case Atlantic, should likewise be available to protect Clabir from forced disclosure of that information, even though from a third party, at least at this stage of the proceeding.

It is argued that the protection, which is loosely referred to as the business strategy privilege, benefits only the target corporation but does not benefit the bidder. In my view, that argument is not correct. The basis proffered for the argument does not derive from any case authority but rather from a construction of the disclosure obligations imposed by Section 13(d) of the Securities Exchange Act of 1934 and regulations thereunder. I, frankly, do not perceive that as a valid basis for denying to the bidder the same protection that would otherwise be allowed to the target.

In support of that argument Atlantic points out that the information that it seeks does track the disclosure categories required by the Schedule 13D, and so it does. But that overlooks the fact that this is not a case where the accuracy of the 13D disclosures is being challenged; and therefore, there is no issue in this case over the validity of 13D disclosures or any matter pertaining to Section 13(d). In essence, what this appears to be is an attempt to obtain information that might clearly be relevant were this a federal 13(d) case but has nothing to do with the issues in this state law case where the 13D filing and the accuracy of its contents are not in issue.

There is one other matter that has been raised, and that has to do with the priority of discovery. I hesitate to pronounce on that because there has been no motion, at least no written motion, addressed to that. All I will say is while I understand the concern that was voiced by Mr. Donley, it appears to me that that concern is mitigated by the fact that Atlantic has taken a position on the record as to its directors' reasons for adopting the poison pill. And since Atlantic is presumably prepared to be bound by that, that should afford Clabir the protection it needs that might otherwise be derived from an order restructuring the discovery priority-wise.

***3** All of this leads to what the disposition of the motion ought to be. It is my ruling that the subpoenas should be allowed to issue but that discovery into Clabir's ongoing strategies and plans-that is, live strategies and plans-should be precluded at this stage. I realize that that ruling may have to be embodied in more specific form in a form of protective order, and I will have to leave it to counsel to do that. But that is my view of how this matter ought to be resolved.

Is there any other matter that might profitably be discussed at this time?

MR. DONLEY: Your Honor, may I raise one point. You have indicated that the relevance of the information sought is conditional upon the fact that Clabir may wish at trial to examine directors about information they could have considered but did not.

THE COURT: You yourself said that Clabir was not going to foreclose itself from that possibility, yes.

MR. DONLEY: Yes, Your Honor. Is it such that if at some point we make an election to forgo that, that it would change your analysis, or that we should perhaps at that point raise the matter anew to Your Honor at that point?

My situation, Your Honor, is that I would wish. I guess, to sit down and think a little bit about that. I certainly stand by the representation that I don't want to forgo that at this point, but if at some later stage I say we are prepared to-

THE COURT: Well, all I will say is that if in this case there develops a change of circumstance such that either side feels that they have grounds to seek a modification of the protective order, then they are free to come back. I am only ruling on today's record based on the contentions that are being made today.

MR. DONLEY: Thank you, Your Honor.

THE COURT: Mr. Lamb?

MR. LAMB: Your Honor, maybe it is something that is best left to the order, but I hesitate, because I don't know if there is an intended distinction between “strategies” and “plans” in Your Honor's ruling.

THE COURT: No. There was no intended distinction between those two words. If there was a distinction being drawn, it was between that type of information that would give a tactical advantage to one side or the other and the other type of information that is unrelated to either of those that you referred to.

And by way of example, you spoke about a possible memorandum from a bank officer that said that the pill doesn't make any difference, that sort of thing, which may not necessarily disclose any ongoing plan or strategy considerations that Clabir is involved in.

MR. LAMB: I only hesitate because there has been disclosure made of plans in the sense that their 13D talks about their plan to acquire the entire equity interest in the company, and in the letter that Mr. Clarke sent on the 5th there was disclosure made there of proposals that might be considered plans, but those are matters that are now publicly disclosed by them. And I would hope that we would be able to receive documents that relate to those proposals or plans that have been rade by them.

***4** THE COURT: All right. If I was insufficiently specific in that, I apologize. Obviously, plans that have already been made and that are already the subject of disclosure fall into a different category from those that are still being contemplated and may be made or may be viable in the future but have not reached the point of decision.

MR. LAMB: Thank you, sir. And I understand that is the only limitation that is being put on the discovery of these banks.

THE COURT: That is the limitation.

MR. LAMB: Yes, sir. Thank you.

THE COURT: The Court stands in recess.

All Citations

Not Reported in A.2d, 1987 WL 758584