

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-3104

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**RICHARD DECKER, CHARLES DECKER AND
ALLEN DECKER,**

PLAINTIFFS-APPELLANTS,

STEVEN DECKER AND MICHAEL DECKER,

PLAINTIFFS,

V.

DAIRYLAND GREYHOUND PARK, INC.,

DEFENDANT-RESPONDENT,

**HAROLD W. RIPPS, HERBERT A. MEISLER, ALLEN
MEISLER, MICHAEL HALLMAN, DOMENICK TIRABASSI, JR.,
ATTILIO J. CICCHINI, DWAYNE T. HAWKINS,
EDWARD KRESS, EDWARD RAPEE, JOSEPH VAN BREE,
BERNARD PECK, YALE GEROL, JACK ROSS AND
JOSEPH B. WOLFE,**

DEFENDANTS.

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ALLEN DECKER,**

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DEFENDANTS.

APPEAL from a judgment of the circuit court for Kenosha County:
MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Richard, Charles and Allen Decker appeal from a judgment dismissing their action against Dairyland Greyhound Park, Inc., for specific performance of a stockholders' agreement with respect to the seating of directors selected by the Deckers in 1994 and 1995 and the exercise of preemptive rights for additional stock issued in 1995. We conclude that the circuit court properly exercised its discretion in determining that it was inequitable to grant specific performance. We affirm the judgment of dismissal.

¶2 In 1989, a stockholders' agreement was entered into between Dairyland and all its stockholders. The agreement created four categories of stockholders and provided that the majority in interest of the stockholders in groups three and four would be entitled to select one-half of the directors to serve on the corporation's board of directors. The Deckers then owned the majority interest in stockholder groups three and four. The agreement also provided that all stockholders would have preemptive rights.

¶3 At the stockholders' annual meeting held in February 1994 and 1995, the Deckers put forth a slate of three directors. None of the nominees were elected to serve. The Deckers claim that this is a breach of the stockholders' agreement and that they are entitled to specific performance. They seek to set aside the 1994 and 1995 elections and all decisions executed by the 1994 and 1995 board of directors, most notably the board's decision to issue additional stock in 1995.

¶4 "An action for specific performance is an equitable remedy and rests in the discretion of the court." *Edlin v. Soderstrom*, 83 Wis. 2d 58, 70, 264 N.W.2d 275 (1978). A decision in equity is reviewed under the erroneous exercise of discretion standard.¹ *Richards v. Land Star Group, Inc.*, 224 Wis. 2d 829, 847, 593 N.W.2d 103 (Ct. App. 1999). Discretionary determinations are sustained if the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.* at 848. Overall fairness in compelling specific

¹ On the parties' cross-motions for summary judgment, the circuit court granted the judgment of dismissal. The Deckers do not suggest that summary judgment was inappropriate. Therefore, we need not recite the standard of review for summary judgment.

performance is an appropriate consideration. *Anderson v. Onsager*, 155 Wis. 2d 504, 513, 455 N.W.2d 885 (1990). Thus, even though a party has established grounds for specific performance, the court may deny such relief if the court examines the totality of the circumstances and concludes that there are compelling equitable reasons to deny relief. *See Richards*, 224 Wis. 2d at 848.

¶5 The circuit court had two alternative grounds for denying specific performance. We conclude that the dispositive ground is the determination that it would be inequitable to grant the relief the Deckers seek.² This was a proper exercise of discretion in light of the history of corporate affairs.

¶6 By 1991, Dairyland was under the scrutiny of the State of Wisconsin Racing Board and in peril of losing its license due to alleged regulatory violations. A 1991 settlement with the Racing Board required Richard Decker to place his shares in an irrevocable voting trust and sell remaining shares to his four sons.³ A 1991 shareholders' voting agreement, entered into to effectuate the settlement with the Racing Board, required Dairyland to maintain a certain membership of the board of directors until December 31, 1994. By August 1995, Dairyland was threatened with having its \$31.8 million loan called in if guaranties from stockholders Harold W. Ripps and Herbert A. Meisler were reduced, as Ripps and Meisler were contractually privileged to do on January 1, 1996. As a condition to

² The circuit court held that the Deckers' action was barred by WIS. STAT. § 180.0304 (1999-2000), which prohibits a shareholder's action to enjoin an unauthorized corporate act unless all affected persons are parties to the proceeding. The parties debate the application of § 180.0304. We need not decide that issue. All statutory references are to the 1999-2000 version unless otherwise noted.

³ The settlement agreement recited that Dairyland had commenced a civil action against the Deckers. It also provided that the Racing Board would request dismissal of pending criminal charges against Dairyland and Richard Decker.

not foreclosing, Dairyland's lender required Dairyland to obtain Ripps' and Meisler's continued guaranty of the full amount of the loan, to grant Ripps and Meisler a combined controlling shareholder interest, and to raise an additional \$1 million in equity funding. Dairyland responded by procuring the continued guaranty in exchange for the issuance of 27,500 shares to Ripps and Meisler.⁴ An offering of 200,000 additional shares at \$5.00 a share (hereafter referred to as the second offering) was made to raise the additional equity funding.⁵

¶7 The Deckers' requested relief puts at risk acts of the board of directors undertaken to advance the viability of Dairyland's operations. Relief would be granted at the expense of Ripps and Meisler who stepped up to guaranty the loan. Specific performance may be denied when it will cause unreasonable or disproportionate hardship or loss to third persons. *McKinnon v. Benedict*, 38 Wis. 2d 607, 617, 157 N.W.2d 665 (1968).

¶8 Additionally, the Deckers seek to rewrite the history of the corporation at a time when they no longer hold a majority interest. In April 1995, to settle litigation brought against him by group four shareholders, Richard Decker transferred shares of stock to those shareholders. This reduced the Deckers' shareholder interest in groups three and four to a minority interest. To grant specific performance would elevate the Deckers' minority interest to that of

⁴ The parties refer to this stock issuance as the first offering.

⁵ None of the Deckers purchased stock when the second offering was made. They acknowledged that they lacked the financial resources to purchase additional stock.

corporate meddler. As the circuit court determined, equity does not permit such a result.⁶

¶9 We turn to consider whether Dairyland ignored the preemptive rights of stockholders when it issued stock to Ripps and Meisler without offering a proportional number of shares to other stockholders. WISCONSIN STAT. § 180.1705(1)(b) provides that preemptive rights do not exist for “[a]ny shares ... issued for a consideration other than cash.” The issuance of shares to Ripps and Meisler fits squarely within this statutory exception as being issued for consideration other than cash. The shares were issued as part of securing debt. The Deckers look to the provision in Dairyland’s Articles of Incorporation that preemptive rights “shall exist as to all shares issued by the Corporation.” Yet this is not a specific provision which trumps the application of § 180.1705(1)(b). *See Milwaukee Sanitarium v. Lynch*, 238 Wis. 628, 634, 300 N.W. 760 (1941) (“The so-called pre-emptive right of a stockholder has certain well-recognized limitations, even in the absence of a specific provision, providing for such limitation, in the articles of incorporation.”). It is not a specific provision granting preemptive rights on shares issued for consideration other than cash. Dairyland did not breach the shareholders’ agreement when shares were issued to Ripps and Meisler.

¶10 The Deckers claim that the second offering of stock violated their preemptive rights. They contend that the offering was inadequate because it could not restore them to their proportional interest because of the shares issued to Ripps

⁶ We reject the Deckers’ oblique suggestion that because the shareholders’ agreement acknowledges that no adequate legal remedy exists for a breach and that it shall be specifically enforced, that specific performance must be granted as a matter of course. The circuit court retains discretion to determine if the requested relief is fair.

and Meisler. The issue is a nonstarter. The issuance of shares to Ripps and Meisler was proper. Moreover, it is undisputed that the Deckers lacked the financial ability to purchase any additional shares. Dairyland provided the requisite opportunity to buy a proportional share of the second offering, but the Deckers could not avail themselves of it. There was no denial of preemptive rights.⁷

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁷ Pending is a motion to strike a portion of the reply brief for raising certain arguments for the first time. The motion is denied as unnecessary because the judgment is affirmed on grounds unrelated to those arguments.

