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Hostile Takeover

Delaware justices won't free Martin Marietta's $5.3 billion bid for Vulcan

Martin Marietta Materials has failed to convince the Delaware Supreme Court to overturn a four-month freeze on its proxy contest and $5.3 billion hostile bid for rival gravel maker Vulcan Materials Co.

Martin Marietta Materials Inc. v. Vulcan Materials Co., No. 254-2012, order issued (Del. May 31, 2012).

The high court's May 31 decision to deny Martin Marietta's appeal cleared the way for a key Vulcan shareholder meeting scheduled for June 1, at which Martin Marietta had hoped to elect four new directors who would push Vulcan to let the investors consider its merger offer.

After oral argument May 31 the full Delaware Supreme Court affirmed a May 4 Chancery Court decision that Martin Marietta had violated a non-disclosure agreement with its larger rival and used confidential information in forming its bid and proxy fight.

The high court effectively endorsed the four-month freeze Chancellor Leo Strine imposed as a punishment. *Martin Marietta Materials Inc. v. Vulcan Materials Co.*, No. 7102, 2012 WL 1605146 (Del. Ch. May 4, 2012).

JUDICIAL TIME-OUT

That means Vulcan's annual meeting — and the director election — were able to take place while Martin Marietta was in a judicial time-out, and a key window in the hostile-takeover contest closed before it could make its next merger move.

If Martin Marietta had been successful, the high court could have taken the unusual step of ordering Chancellor Strine to postpone the Vulcan meeting until new proxy materials could be prepared, Larry Hamermesh, a professor at Widener University School of Law in Wilmington, Del., told Reuters.

If the ruling was reversed and the meeting enjoined on such short notice, it would have been "quite a fire drill," Hamermesh said.

Legal experts had said Martin Marietta's chances of overturning the ruling were slim.

"Strine is a highly regarded judge who is not often reversed," Mike Kelly, a Wilmington attorney with McCarter & English who is not involved in the case, told Reuters. "The standard for reversal is abuse of discretion, which is a very tough standard for reversal."

HOW CONFIDENTIAL?

Martin Marietta made an unsolicited, stock-swap bid for Vulcan in December 2011 to create the world's largest producer of sand, gravel and other building materials.

Vulcan rejected that bid and charged that its rival had violated confidentiality agreements in preparing the deal.

The two companies went to the Chancery Court to get a ruling on that charge, and Vulcan then asked Chancellor Strine to enjoin Martin Marietta for at least four months.

Although Vulcan is incorporated in New Jersey and Martin Marietta is chartered in North Carolina, they agreed that disputes over the contract would be settled in Delaware.

If the justices overturn the lower court ruling, they could order the Chancery Court to postpone the Vulcan meeting until new proxy materials could be prepared, corporate law professor Larry Hamermesh said.

The confidentiality agreements were signed during the time Vulcan and Martin Marietta were in serious deal talks in April 2010 and had exchanged sensitive information.

Vulcan walked away in mid-2011, however, citing concerns about regulatory hurdles and whether Martin Marietta was inflating the $250 million cost savings estimate that the merger would produce, according to court records.

BEYOND THE CONTRACT?

Martin Marietta appealed Chancellor Strine's ruling and won an expedited schedule that compressed all briefing and oral argument into less than three weeks because of the approaching June 1 shareholder meeting.

In its opening brief, Martin Marietta argued that the judge erred by "looking beyond the plain, unambiguous language of the relevant contract" and "violating fundamental principles of contract interpretation."

Chancellor Strine "invented and then added material terms to the agreement" to support his misinterpretation regarding what the parties were barred from doing after they received nonpublic information about each other's business, the brief said.

No one but the judge thought that the confidentiality agreement required a "standstill" that barred the two companies from using publicly available information to mount a proxy campaign or an unsolicited offer, Martin Marietta argued in the brief.

"Left undisturbed, the trial court's precedent would inject manifest uncertainty into contractual relationships and interpretation," the brief said.

LONG ROAD TO REVERSAL

In an answering brief, Vulcan said Chancellor Strine rightly found Martin Marietta breached the confidentiality agreement in several different ways — any one of which would have justified his injunction.

Vulcan argued that in order for the justices to reverse the Chancery Court ruling, Martin Marietta would have to prove that the chancellor found each of those alleged breaches in error because the contract language actually allowed it to disclose the information.

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Related Court Documents:
Opening brief: 2012 WL 1866620
Answering brief: 2012 WL 1866621