LEE FOSTER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE TOWN AND COUNTRY TRUST, et al.	*	BALTIMORE CITY
	*	Part 20
Defendants	*	Case No.: 24-C-06-001442
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MEMORANDUM OPINION

I. Background

Plaintiff, Lee Foster, seeks to represent a class[1] of shareholders of the common stock of Town and Country Trust ("TCT") to enjoin the proposed acquisition of TCT by Magazine Acquisition LP ("Magazine"), a joint venture formed by Morgan Stanley Real Estate and Onex Real Estate, as announced on December 19, 2005. The terms of the original acquisition agreement called for a cash out of public stockholders at $33.90 per share, which plaintiff challenges as an undervaluation of his equity interests in TCT. Pending before the Court at the time of the February 21, 2006 hearing were plaintiff's motion for expedited proceedings, to accelerate discovery for the purposes of seeking a preliminary injunction against the scheduled March 9, 2006 shareholder meeting to ratify the acquisition agreement and defendants' motion to dismiss or, in the alternative, for summary judgment. By Order dated February 21, 2006, the Court denied plaintiff's motion for expedited proceedings and granted defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be

[1] The Court has not yet been presented with a motion for class certification.

granted, with leave to amend within thirty days.

II. Discussion

The Court files this Memorandum Opinion to set forth briefly its reasons in support of its rulings on the pending motions.

The gravamen of plaintiff's argument[2] is that the defendants violated their fiduciary duties to TCT by entering into an acquisition agreement with Magazine at $33.90 per share before adequately testing the market to determine an appropriate price at which to begin a formalized bidding process. Because the acquisition agreement with Magazine permitted TCT's Board to consider unsolicited proposals from other entities after December 19, 2005, a bidding contest did ensue. As of February 16, 2006 Magazine had increased its offer to $40.20 a share and the other principal bidder, Oriole Partnership LLC, declined to increase its earlier offer from $40.15 a share, thereby appearing to end the bidding.

Plaintiff's counsel set forth four bases in support of its argument that TCT entered into the December 19, 2005 merger agreement with Magazine prematurely. Plaintiff's first objection is that Lazard Fréres & Co. LLC ("Lazard"), an investment banking firm retained on October 21, 2005 by TCT to serve as financial adviser with respect to a sale or merger, was not instructed to canvas the marketplace to obtain a fair per-share selling price prior to December 19, 2005. Plaintiff candidly admits that, standing alone, there is no legal authority to require such

[2] Plaintiff has suggested that he may amend his complaint to include allegations that the original $20,000,000 break-up fee, which was a part of the December 19, 2005 acquisition agreement, constituted an unlawful defense mechanism under theories outlined in *Revlon, Inc. v. McAndrews and Forbes Holdings, Inc.*, 506 A.2d 173 (Del. Super. 1986), thereby eliminating the possibility of an effective bidding contest after the announcement of the agreement between TCT and Magazine. Such allegations are not before the Court on the pending motions.

activity. Secondly, plaintiff complains that TCT did not reach out to third parties to obtain "feelers" in the marketplace, a market-check which it contends is required even under Maryland corporate principles as enunciated in *Jasinover v. The Rouse Co., et al*, 2004 Wl 3135516 (Md. Cir. Ct.). Thirdly, because plaintiff contends there is no valid business purpose for failing to perform such a pre-agreement market-check, the directors' decision to adopt the acquisition agreement on December 19, 2005 should not be afforded the protection of the business judgment rule. Md. Code Ann., Corps. & Ass'ns Art., § 2-405.1. Finally, plaintiff argues that TCT has not engaged in a process that permitted an appropriate post-agreement market-check, such as that approved in *Jasinover v. The Rouse Co., et al., supra*.

This Court disagrees with plaintiff's contention that the defendants have violated their fiduciary duties in adopting the merger agreement of December 19, 2005, thereby establishing the "floor" for all further price-per-share bidding. The directly relevant commentary from James Hanks is quoted by Judge Sweeney in his decision in *Jasinover*, to the effect that the Board is entitled to the presumption of the business judgment rule under Maryland law, so long as its actions are reasonable and that an acquisition agreement is entered into after arms-length negotiations, even if no pre-agreement "shopping" is undertaken. In a change of control situation such as that present here, "some demonstrable market-check" is most likely required. Hanks, Maryland Corporation Law § 6.6 (b) (2003 Suppl.). The negotiations leading up to the acquisition agreement of December 19, 2005 with Magazine are detailed in TCT's proxy materials filed with the SEC. As Judge Sweeney stated in *Jasinover*, "Maryland does not require an auction when the decision is made to sell a corporation. There is no requirement that the Board fully shop the company to multiple bidders and have a so-called 'level playing field' for

all bidders. There will be a need to market-check or test the Board's decision, but the Board is free to lock up an attractive deal and use post agreement methods to do so." Even under the enhanced scrutiny employed by the Delaware courts, the controlling authority is that "a Board need not be passive even in an auction setting. It may never appropriately favor one buyer over another for a selfish or inappropriate reason, such as occurred in *Revlon*, but it may favor one over another if in good faith and advisedly it believes shareholder interests would be thereby advanced." Fort Howard Corporation Shareholders Litigation, 1988 Wl 83147 (Del. Ch.). There is no question in this case that the bidding did not stop when TCT entered into the acquisition agreement with Magazine on December 19, 2005. The price-per-share offerings have risen substantially as a result of the bidding which ensued. Accordingly, plaintiff has failed to state a claim under Maryland law and his complaint must be dismissed. If plaintiff chooses to take advantage of the Court's leave to amend within the appropriate time frame and raises new allegations concerning the final acquisition agreement, determination of any issues related thereto will have to wait for another day. In the Court's judgment, monetary damages will adequately compensate the plaintiff for any such claim, eliminating the need for expedited discovery.[3]

/s/
ALBERT J. MATRICCIANI, JR.
Judge
February 24, 2006

[3] Plaintiff has not, at this point, pursued its request for a preliminary injunction.

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