Circuit Court for Howard County
Case No. C-13-CV-20-000468

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 369

September Term, 2021

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QI FENG ZHENG, ET AL

v.

RICHARD KE

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Nazarian,
Friedman,
Ripken,

JJ.

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Opinion by Friedman, J.

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Filed: July 14, 2022

Foobao USA, Inc. is a Maryland close corporation formed for the purpose of operating a restaurant. The stockholders in Foobao include Richard Ke, Qi Feng Zheng, and Rong Zheng.

Ke filed a Complaint in the Circuit Court for Howard County alleging financial improprieties and mismanagement of Foobao by the Zhengs. Among the forms of relief sought by Ke was the appointment of a receiver to wrap up the affairs of Foobao and liquidate its assets. The Zhengs then filed a pleading entitled "Defendants' Joint Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim and Election Pursuant to Md. Code Ann. Corp. & Assoc. [("CA")] §4-603 and Request for Hearing." The circuit court held a hearing and entered a stay in the case. At that point, Ke filed a notice of voluntary dismissal and the circuit court closed the case. The Zhengs then filed a motion requesting that the circuit court declare that Ke had no ownership interest in Foobao's stock or, in the alternative, determine the fair market value of the stock as of the date of Ke's complaint pursuant to CA § 4-603(b). Instead, the circuit court denied the motion and declined to reopen the case. This timely appeal followed.

## ANALYSIS

As our recently-departed, former colleague, Judge Steven B. Gould observed for this Court in *Bartenfelder*:

> The distinguishing feature of a close corporation most relevant here is the restraint placed on the ability of stockholders to transfer their stock. By default, and unlike other types of Maryland corporations, stock in a close corporation is not transferrable without the consent of the other stockholders. The rationale is that in such an intimate business relationship, people should have the right to choose their partners.

> A natural consequence of this default restriction, however, is that, in the absence of consent to transfer stock, a stockholder can be trapped in an investment that, for whatever reason, is no longer desired. To address this predicament, CA § 4-602 gives the trapped stockholder the right to seek a dissolution of the corporation if consent is denied or for certain other enumerated reasons, thus enabling the stockholder to receive value for the stock through the liquidation of the company.
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> Standing alone, such dissolution rights would tip the balance of power in favor of the stockholder who wants to exit the company and against the stockholder who wants to continue with the business. To level the playing field, CA § 4-603 gives a stockholder the ability to prevent the dissolution, or the appointment of a receiver, by electing to purchase the stock of the dissolution-seeking stockholder. [T]his purchase right [, however,] applies *only* in the context of a dissolution proceeding.

*Bartenfelder v. Bartenfelder*, 248 Md. App. 213, 234-35 (2020), *cert. denied*, 472 Md. 5 (2021) (internal citations omitted). Thus, we explained that the statute gives a disaffected stockholder the right to dissolve the close corporation but also allows a remaining stockholder to buy out that disaffected stockholder. In *Bartenfelder*, we held that, given the pleadings filed, the disaffected stockholder had not initiated dissolution proceedings and thus had not triggered the possibility of a buy-out. Here, by contrast, there is no doubt that Ke initiated dissolution proceedings. Rather, the question is whether he could unilaterally abandon them and thereby prevent election.

Below and in this Court, the parties have ably briefed their views as to the proper characterization of the Zhengs' election under the Maryland Rules. According to the Zhengs, their CA § 4-603 election was a counterclaim, pursuant to Rule 2-331(a), and thus, was not subject to Ke's unilateral voluntary dismissal pursuant to Rule 2-506(b). By contrast, Ke argues that the Zhengs' CA § 4-603 election was in the nature of an affirmative defense, pursuant to Rule 2-323(g) and, therefore, did not survive Ke's voluntary dismissal.

We note, however, that the border line between counterclaim and affirmative defense is, and is intended to be, a little blurry: "When a party has mistakenly designated [an affirmative] defense as a counterclaim or a counterclaim as [an affirmative] defense, the court shall treat the pleading as if there had been a proper designation, if justice so requires." MD. RULE 2-323(g).[1] Given this fluidity, we think the better resolution is statutory.

In § 4-603(a), the General Assembly explained that the remaining stockholder's election to purchase only exists to "avoid the dissolution of the corporation ...." CA § 4-603(a). We think that the plain meaning of this provision is that the right of election only exists when there is a threat of dissolution. This comports with the language—if not the holding—of Judge Gould's opinion in *Bartenfelder*. Once the threat of dissolution was withdrawn and the threat obviated, the right of election ended as well. We hold that Ke's voluntary dismissal of his complaint automatically terminated the Zhengs' right of election. We, therefore, affirm the decision of the circuit court.

**JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. APPELLANT TO PAY COSTS.**

[1] The panel is uncertain why this portion of the Rule is indented and what that is intended to denote.