1969

Mackay & Knobel Enterprises, Inc., A Utah Corporation v. Teton Van Gas, Inc., A Corporation, Van Gas, A Corporation : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

MACKAY & KNOBEL ENTERPRISES, INC., a Utah Corporation,

Plaintiff,

vs.

TETON VAN GAS, INC., a Corporation, VAN GAS, a Corporation,

Defendants.

Case No. 11,555

APPELLANT'S BRIEF

Appeal from judgment of Third Judicial District Court for Salt Lake County
Honorable Merrill C. Faux, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

MACKAY & KNOBEL ENTERPRISES, INC., a Utah Corporation,

Plaintiff,

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

Suit for fire damages resulting from negligent installation of butane storage tank.

DISPOSITION IN LOWER COURT

District Court dismissed complaint because corporate charter was suspended after suit was filed although charter was reinstated before denial of motion for new trial or to amend order of dismissal.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks an order vacating the order dismissing its complaint and permitting the case to proceed to trial.

STATEMENT OF FACTS

This action was filed to recover damages for the destruction of Plaintiff's service station building and equipment resulting from improper installation of butane tank without automatic or manual shut-off valves. A minor fire resulted in complete destruction of Plaintiff's property because the building was saturated with butane gas which could not be shut off. (R. 1-4). Plaintiff's corporate charter was suspended six months after the complaint was filed by reason of non-payment of Utah Franchise Taxes. (R. 10, 26) but was reinstated before denial of plaintiff's motion to correct judgment or for a new trial. Defendant's motion to dismiss by reason of said suspension was granted by Judge Faux.

Plaintiff's new counsel filed a motion to amend or correct the order or for a new trial. Judge Faux denied the motion, concluding that repeal of 16-1-2, UCA, 1953, and adoption of 16-10-100 and 16-10-101, UCA, 1953, as a part of the Utah Business Corporation Act without amending 59-13-61, UCA, 1953, concerning suspension of corporate charters for non-payment of corporation franchise taxes, left plaintiff without power to sue in connection with the winding up of its affairs (R. 67, 68).

ARGUMENT

POINT I

SUSPENSION OF CORPORATE CHARTER FOR NON-PAYMENT OF FRANCHISE TAXES DOES NOT AFFECT ITS RIGHT TO SUE IN CONNECTION WITH WINDING UP OF ITS AFFAIRS.

The sole issue in this case it whether a corporation may bring a lawsuit to wind up its affairs after its corporate charter has been suspended.

(a) *Rights of "suspended" corporation under prior law.* 59-13-61, UCA, 1953, reads in part as follows:

"If a tax computed and levied hereunder is not paid . . . *the corporate powers, rights and privileges of the delinquent taxpayer, if it is a domestic corporation, shall be suspended . . .* " (Emphasis added)

16-1-2, UCA, 1953, of the act as it existed prior to its repeal when the Utah Business Corporation Act was adopted read in part as follows:

"Any corporation organized under the laws of . . . Utah whose franchise . . . may . . . expire by . . . *forfeiture,* or by dissolution by decree of court *may nevertheless continue for the purpose of winding up its affairs; and to effect this purpose may . . . sue and be sued,* contract, and exercise all other incidental and necessary powers. (emphasis added)

A long line of Utah case establish the rule that a corporation whose charter has been "suspended" as provided in 59-13-61, UCA, 1953, or "forfeited" as provided in the prior statute could engage in limited business activities to wind up its affairs and could sue and be sued in connection therewith. Some of those cases are as follows:

(1) In Houston v. Utah Lake Land, Water & Power Co., 55 U. 393, 187 P. 174 (1919) the Court acknowledge the right of a corporation whose charter had been "forfeited" under prior law wind up its affairs, but did not authorize it to engage in new business.

(2) In Consolidated Mills & Feed Yards Co. v. Patterson, 62 U. 506, 221 P. 159 (1923) corporate officers were held personally liable for new debts incurred by corporation after its charter had been "forfeited" for nonpayment of taxes.

(3) In Henroid v. East Tintic Development Co., 52 U. 245, 173 P. 134, (1918), the Court held that the statute contemplated that the board should wind up the corporate affairs in a case where the corporate charter and right to conduct business were "forfeited."

(4) In Warren v. Dixon Ranch Co., 123 U. 416, 260 P. 2d 741, the Court held that service on director of a corporation whose charter had been "suspended" gave jurisdiction over the corporation, though the director had never been authorized by charter, by-laws or court appointment to act as agent for the stockholders.

(b) *Judge Faux has ruled that "suspended" corporation has no right to sue to assist in winding up its affairs.*

Judge Faux has held that the right of a corporation to sue in connection with winding up of its affairs no longer exists by reason of the repeal of 16-1-2, UCA, 1953, in connection with adoption of the Utah Business Corporation Act. That act has provisions which are similar to the old 16-1-2, UCA, 1953, but which do not specifically deal with "suspended" corporations, and which read in part as follows:

(c) *Rights of "dissolved" corporation under present law.*

16-10-100. SURVIVAL OF REMEDY AFTER DISSOLUTION.

"*The dissolution of a corporation either* (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in this act, or (3) by expiration of its period of duration, *shall not take away or impair any remedy available to or against the corporation* ,its directors, officers, or shareholders, *for any right or claim existing,* or any liability incurred, *prior to such dissolution* if action or other proceedings thereon is commenced within two years after the date of such dissolution. *Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name . . .* " (Emphasis added)

16-10-101. SURVIVAL OF CORPORATE ENTITY AFTER DISSOLUTION. "*Notwithstanding the dissolution of a corporation* either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by a decree of court, or (3) by expiration of its period of duration, *the corporate existence of such corporation shall nevertheless continue for the purpose of winding up its affairs* in respect to any property and assets which have not been distributed or otherwise disposed of prior to such dissolution, *and to effect such purpose such corporation may* sell or otherwise dispose of such property, *sue and be sued,* contract and exercise all other incidental and necessary powers." (Emphasis added)

It is clear that if an actual dissolution of the corporation has occurred the corporation could sue on a claim that arose prior to dissolution. Falcanaero Enterprise, Inc. v. Valley Investment Co., 16 U, 2d 77, 395 P.2d 915 (1964).

The new statutes, however, fail to deal directly with the status of a corporation whose charter has been "suspended" for non-payment of corporate franchise tax.

(d) *Status of "suspended" corporation under present law.*

Rule 65B(b) (1), URCP, authorizes suit against a corporation whose charter has been "suspended," and thereby recognizes that such a corporation has power to defend a lawsuit. It would seem that if a corporation has power to defend a lawsuit that it also has the power to file a counterclaim and/or the power to commence a lawsuit for purposes of winding up its affairs. The public policy announced by 16-10-100 and 16-10-101, UCA, 1953, quoted above, appears to be that corporate existence should continue for purposes of effecting an orderly winding up of the affairs of the corporation, disposition of claims and lawsuit, etc. even though the very existence of the corporation has been terminated. Some other courts that have dealt with similar problems have concluded that a corporation whose charter has been "suspended" can still sue to wind up its affairs:

(1) In Montana Valley Land Co. v. Bestul, 253 P. 2d 325 (Montana), the Court held that a corporation whose charter has been suspended for nonpayment of taxes is not completely dead but has sufficient life to be a repository for title to real estate, and may sue or defend, if, under statute, it is entitled to reinstatement at any time and hence is not dissolved. (In our case the corporate charter has in fact been reinstated).

(2) In Carpenter & Carpenter v. Kingham (Wyoming), 109 P. 2d 463, 110 P. 2d 824, the Court held that a corporation could bring an action, after its dissolution by a proclamation of the governor by reason of failure to pay annual tax provided by law, in its corporate name for the use of persons entitled to receive the proceeds of such action.

(3) In Pacific Northwest Bell Tel. Co. v. Rivers (Idaho), 398 P. 2d 63, the Court held that a corporation does not die by becoming delinquent for failure to pay annual tax as does natural person or corporation whose term of existence has terminated, but is rather in *a state of suspended animation* from which condition it can be relieved by paying statutory penalties.

(4) California law expressly prohibits a corporation whose charter has been suspended for failure to pay corporation tax, however even under those circumstances the court has permitted reinstatement of the charter while a suit was pending and has permitted the matter to proceed to trial. Pac. Atlantic Wine v. Duccini, 245 P. 2d 622, 111 C.A.2d 957; Maryland Casualty Co. v. Superior Ct., 91 Cal. App. 356, 267 P. 169.

(5) In Eagle Oil Corp. v. Cohassett Oil Corp., 263 Mich. 371, 248 NW 840 the Court held that the lower court properly allowed the corporation which was in default for failure to pay its privilege tax at the time of the hear-

ing of the case to cure such default by payment of the required fee.

(6) See also annotation at 6 ALR 3d 341, Sec. 8.

The intention of the legislature appears to have been to continue existing procedures and rights so far as practicable in adopting the Utah Business Corporation Act, as indicated by 16-10-143, UCA, 1953, which reads in part as follows:

> "*The repeal of a prior law by this act shall not affect any right accrued or established,* or any liability incurred, or any action or proceeding begun under the provisions of such law prior to the repeal thereof . . . " (Emphasis added)

The right of a corporation whose charter had been "suspended" to bring legal action to wind up its affairs was a right that had been "established" prior to the enactment of the Utah Business Corporation Act, and since that act does not expressly prohibit a corporation whose charter has been "suspended" from using the courts to wind up its affairs, it is reasonable to conclude that the legislature intended that the existing and "established" procedure and "right" to use the courts in winding up its affairs would be continued. The Model Business Corporation after which the Utah Act was patterned simply did not make provision for the conduct of the affairs of a corporation whose charter has been "suspended" for nonpayment of taxes. Where the legislature has failed to provide a procedure for disposition of the corporate assets and the winding up of the corporate affairs in case of a "suspension" the Court is free to follow judicial precedent

and to use established procedures in winding up the affairs of such a corporation.

If the current law were to be construed as counsel for Defendant and Judge Faux have construed it, if a corporation merely fails to pay its franchise tax its charter may be "suspended." If the delinquency continues for a longer period the more severe penalty of involuntary dissolution in an action filed by the Attorney General may be imposed, as provided in 16-10-89, UCA, 1953, which reads in part as follows:

> "*A corporation may be dissolved involuntarily* by a decree of the district court in an action filed by the Attorney General *when* it is established that:
> (a) . . . *its corporate powers, rights and privileges have been suspended* as provided in 59-13-61; . . . "
> (Emphasis added)

Even after the more severe penalty of dissolution has been imposed as the result of a long continued delinquency in payment of tax, the corporation still has power under 16-10-100 and 16-10-101, UCA, 1953, (quoted above) to sue and to do other limited acts in connection with the winding up of its affairs. It is unreasonable to conclude that the legislature intended that a corporation whose charter has merely been "suspended" but has not had the more severe penalty of involuntary dissolution imposed upon it would have less power to wind up its affairs than a corporation whose very existence had been terminated by involuntary dissolution.

(e) *Public policy requires orderly winding up of the affairs of a "suspended" corporation.*

Public policy in preserving the rights of creditors stockholders, and other persons interested in or whose rights are affected by the "suspended" corporation requires that the affairs and assets of that corporation be wound up in an orderly fashion. If such a corporation has no power to sue, it probably has no other power to sell or otherwise assemble and dispose of its assets or affairs. The result of such a situation would be complete chaos and would probably reult in a windfall and wrongful appropriation of corporate assets by persons not otherwise entitled thereto. In our situation such a rule will confer upon the Defendants immunity for their wrongful acts and will deny to Plaintiff, its creditors and stockholders the right to recover their one remaining valuable asset, to-wit, a claim against the Defendants for destruction of the corporate assets and property.

The protection of revenue to the State of Utah does not require such extreme measures. Merely terminating of the right of the corporation to enter into new business transactions appears to have been the intent of 59-13-61 and 59-13-62, UCA, 1953.

The policy of the law is to determine lawsuits on their merits and not a mere technicality such as the nonpayment of a tax revenue to the State of Utah. See Kirkham v. Spencer, 3 U. 2d 399, 285 P. 2d 127. Rule 1, URCP. 19 Am Jur 2d 1009, Sec. 1662, etc. Under 78-12-40, UCA, 1953, Plaintiff is entitled to commence a new lawsuit against Defendants on the same facts since the failure of this lawsuit is not on the merits, which statute reads in part as follows:

> "*If any action* is commenced within due time and . . . the Plaintiff *fails* in such action . . . *otherwise than upon the merits,* and the time limited by law . . . for commencing the same shall have expired, *the Plaintiff . . . may commence a new action* within one year after the reversal or failure." (Emphasis added)

To permit the dismissal of this action on a technicality only to refile as provided in the above statute, is a useless act, particularly where (as in our case) the technicality has been remedied by reinstatement of the corporate charter and payment of taxes and penalties prior to denial of Plaintiff's motions.

(f) *Duties of directors of "suspended" corporation.*

In Consolidated Mills & Feed Yards Co. v. Patterson, (1923), 62 U. 506, 221 P. 159 the Court stated:

> "where a corporation's charter is forfeited in this state, it is the duty of the directors, who are trustees for the stockholders and creditors, to assemble its assets, liquidate its indebtedness, and generally conduct its affairs in such manner as will properly expedite the winding up of the corporation's business."

The directors still have those same duties under the current law but must have access to the court to properly carry out their duties.

SUMMARY

Repeal of 16-1-2, UCA, 1953, which dealt with the power of a corporation whose charter had been "forfeited" to wind up its affairs but makes no mention of a

"suspended" charter and adoption of 16-10-100 and 16-10-101, UCA, 1953, as a part of the Utah Business Corporation Act which provides for suits by and winding up affairs of "dissolved" corporations and which also makes no mention of the right of a corporation whose charter has been "suspended" to wind up its affairs does not prohibit Plaintiff whose charter was "suspended" after the suit was started from continuing this lawsuit filed in connection with the winding up of its affairs, particularly where the charter was in fact reinstated prior to denial by Judge Faux of motion to correct judgment and for a new trial.

Public policy requires that the rights of creditors, stockholders and others in a corporation whose charter is "suspended" be protected from wrongful appropriation, and that the affairs of such a corporation be liquidated and wound up in an orderly fashion, rather than by a scrambling for possession based upon a technicality. Defendant should not be permitted to reap a windfall and to escape responsibility for its misconduct which destroyed substantially all of the assets of the Plaintiff because of poor draftsmanship by the legislature or a technicality.

The pending lawsuit should be permitted to go to trial on the merits.

Respectfully submitted,

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