

1981

Lloydona Peters Enterprises, Inc. v. Dale M. Dorius and Deloris P. Dorius : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

LLOYDONA PETERS ENTERPRISES, INC.,)
)
Plaintiff - Appellant,)
)
vs.)
)
DALE M. DORIUS and DELORIS P.)
DORIUS,)
)
Defendants - Respondents.)

CASE NO. 16594

18059

BRIEF OF APPELLANT

AN APPEAL FROM THE JUDGMENT OF THE FIRST
JUDICIAL DISTRICT COURT, OF BOX ELDER
COUNTY, STATE OF UTAH, THE HONORABLE
RONALD O. HYDE, JUDGE, PRESIDING.

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FILED

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Plaintiff - Appellant,)	
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NATURE OF THE CASE

This is an action by the Plaintiff-Appellant corporation through its president to protect and preserve corporate assets.

DISPOSITION IN THE LOWER COURT

The Lower Court held that the president of the corporation was not entitled to bring this action on behalf of the corporation and dismissed the case without a hearing on the merits.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks reversal of the lower Courts judgment of dismissal and a remand of this matter to the lower Court for adjudication on the merits.

STATEMENT OF FACTS

The Plaintiff-Appellant corporation is owned equally by four sisters, one of whom is the Defendant Deloris P. Dorius. (R. 18). Currently, the four sisters are deadlocked in groups of two as to whether or not a corporate resolution authorizing the Defendant Deloris P. Dorius, Secretary of the Corporation, and her husband, the Defendant Dale M. Dorius, to purchase property purchased jointly by the Plaintiff-Appellant corporation and the Defendants should be passed. (R. 63). Reconciliation of the two groups of sisters on this matter did not, and does not now, appear imminent. (R. 63). The title to the property, though purchased jointly, continues to be held by the Defendants-Respondents in spite of the Plaintiff-Appellant corporation's repeated request to have the Defendant-Respondents deliver it over. (R. 63).

In view of the deadlock between the four members of the board of directors as to the sale of the property and the fact that the title to the property is still in the possession of the Defendants-Respondents, the president of the corporation, Jean P. Hull instituted this action on behalf of the corporation to preserve and protect its interest in the above-mentioned property. Defendants-Respondents responded to this suit by

moving the lower Court to dismiss this action on grounds, inter alia, that the president was not empowered to bring this suit in behalf of the corporation. The Court below, despite Utah case law directly to the contrary, allowed the Defendants-Respondents' Motion to Dismiss holding that the president of the corporation was not authorized to bring this action. It is from the lower Courts ruling and judgment on this Motion that the Plaintiff-Appellant appeals.

ARGUMENT

- I. THE LOWER COURT'S FAILURE TO FOLLOW KAMAS SECURITIES CO. VS. TAYLOR, 226 P.2d 111 (Utah 1950) RESULTS IN ERROR AT LAW REQUIRING REVERSAL OF THE JUDGMENT OF DISMISSAL ENTERED BELOW.

The holding of Kamas Securities Co. vs. Taylor, 226 P.2d 111 (Utah 1950) is applicable to the present case and controlling on these facts.

In the Kamas Securities case the Plaintiff corporation, through its president, sued its secretary for delivering to unauthorized individuals collateral which the corporation held on a note due it. One of the grounds that the Defendant raised to defend the claim was that the president was not capable of bringing the action without a resolution from the Board of Directors. The Court rejected that argument. It stated:

" It is true that there was no resolution of the Board of Directors directing such suit to be filed, but an executive officer is not required to wait for formal resolution of the directors to perform his official duties to preserve the assets of the corporation or to prevent their disipation." 226 P.2d at 115 (emphasis added) .

Thus, in a corporate setting where a loss of corporate assets is at stake, it is not only proper for the president to take legal action to preserve the assets, it is one of his "official duties." This is precisely what has occurred in Lloydona.

The pertinent minutes of the corporate meetings all show that there is a clear dispute as to the sale arrangement of the property which was jointly purchased by the Plaintiff-Appellant and the Defendants-Respondents. The October 17, 1978 minutes, upon which Defendants-Respondents have relied to show that a sale was consummated (R.35), do state that a sale to the Defendants-Respondents is contemplated. They also state clearly and explicitly that the sale is still contingent upon an agreement as to the price. The whole of the minutes of that meeting that pertain to the matter in question, as reproduced below, clearly show this state of facts.

" The law office will be paid for in November 1978. The original purchase price was \$19,000.00. Lloydona paid \$2,500.00 down on it as did Deloris and Dale. Deloris also paid \$500.00 for closing costs from her personal money. The Dorius' to buy Lloydona's portion of the law office. Dale has arranged for a current and independent appraisal through Miller Realty in Brigham and Jean will arrange for an appraisal through Realtor in Ogden. Monthly payment for the office has been \$240.35. The papers concerning the financial agreements between Lloydona and the Dorius's are in escrow until final payment. Stockholders will receive a copy of the agreement when the final payment has been made and the Dorius's have received the papers from escrow. The building was purchased in December 1971. After the appraisals have been completed Jean, Gay and Deloris will meet with Dale and decide on a price. They will then contact Joy and confer with her before a final decision is made." (R. 38) (emphasis added).

The Defendants-Respondents also relied on the minutes from the corporations annual meeting of January 30, 1979 to claim there was a clear corporate resolution consummating the sale. (R. 35). Again, a reading of the minutes, rather than showing the acceptance of a corporate resolution, demonstrates with clarity the deadlock pitting two sisters against two sisters. The whole of these minutes, with pertinent points underlined, states:

" Office Building - Jean and Joy requested that the copies of the original contract to purchase the office building be clarified and given to members of Lloydona. A lengthy discussion ensued. There was a lengthy discussion as to the recent appraisals obtained for the building, especially by Bruce Christensen. Gay proposed that unless there is a majority vote against, that we accept the \$14,000.00 offer made by Dale Dorius to purchase Lloydona's interest in the office building. It was seconded by Deloris. Two for, two against. Deloris clarified that it was not the intent of the parties involved in the purchase of the building to sell the office building to a third party. All were in agreement to this.

Jean proposed that a clarification of the paper work from escrow be made and Joy seconded this proposal. Two for, two abstention. Gay moved that the Christensen appraisal be accepted as a valid appraisal and Deloris seconded it. It was thereafter agreed that it was a valid appraisal by all present." (R. 42) (emphasis added).

As the minutes state, two were "for" and two were "against" the proposal to sell the property. The deadlock is clear.

Defendants-Respondents have also sought to rely upon the last two sentences of the above quote in minutes stating that there was a unanimous vote as to the validity of the appraisal, to show that there was an agreement to sell on those terms. The minutes speak for themselves. The proposal was that

" the Christensen appraisal be accepted as a valid appraisal." (R. 42). Thus, there was no agreement and approval as to the sale of the property, only to the validity of the appraisal. The decision to sell, was deadlocked in sets of two.

Further evidence that there was a deadlock between the groups of sisters comes from the corporate minutes of November 5, 1979. (R. 63). At that meeting the previously quoted January 1979 minutes were amended and approved as amended. The amendments clearly reflect the split of two deadlocked groups of sisters.

" Paragraph 5 - Office Building Jean stated that Gay's Motion was not a fair Motion. Joy and Jean stated that \$14,000.00 is not acceptable and they feel the transaction is not complete or settled. Joy and Jean feel that Lloydona should continue to pay on the office expenses. Gay and Deloris agree that the \$14,000.00 should and has been accepted for the office building and feel of the transaction has been and is concluded. Jean stated that she called all of us regarding the original purchase of the office building and Gay does not recall being contacted as she was in Peru at the time. No one went through the steps of overseeing the original paper work and signing the same on behalf of the corporation." (R. 63) (emphasis added).

Thus, the facts in the present case, as demonstrated by the pertinent corporate minutes, are that two groups of sisters are deadlocked as to whether corporate property should be sold or retained. The result of the deadlock has been the inability of the corporation to act while the title to the corporation's interest in the aforementioned property remains in the possession of the Defendants-Respondents, a fact which these Defendants-Respondents neither dispute nor deny. In the face of this

corporate inability to act the corporate president has filed this suit to compel the return of the corporation's one-half interest in the aforementioned property and thus preserve the corporation's assets. Such a fact situation is precisely what the Kamas Securities case was intended to cover. For failure to follow this precedent, the lower Court's Judgment of Dismissal should be reversed as a matter of law with a remand for a decision on the merits.

II. THE LOWER COURT ERRED IN THAT THE ARGUMENTS UPON WHICH IT COULD HAVE RELIED FOR ITS JUDGMENT OF DISMISSAL WERE INSUFFICIENT TO JUSTIFY DEPARTURE FROM THE KAMAS SECURITIES HOLDING.

The substance of the Ruling of the lower Court in granting Defendants-Respondents' Motion to Dismiss states in toto:

Based on the Pleadings, Memoranda, and Affidavits on file herein, I find that the control and management of the Plaintiff corporation is in the directors, and they alone may authorize the institution of litigation. That the president thereof does not have the implied power or the inherent power to institute this litigation in the name of the Plaintiff corporation. (R. 84).

As noted at the outset of the ruling the Court gave no independent rationale as to why the president did not have the authority to file this suit in the name of the corporation. Rather, the Court based its ruling "on the Pleadings, the Memoranda, and the Affidavits on file herein." (R. 84). Thus, the arguments which the Defendants-Respondents raise to distinguish Kamas Securities take on additional importance; they become the rationale of the Court.

In the lower Court the Defendants-Respondents stated that

"the Kamas case can be differentiated on its facts from the Lloydona vs. Dorius case" and gave three reasons for the differentiation: (1) the powers of the president in each case differed, (2) the irreparable loss present in Lloydona differed from that in Kamas Securities, and (3) the nature of the business in Kamas Securities was different and was controlling. (R. 68). None of these arguments is sufficient to distinguish the Kamas Securities from the case at hand.

A. THERE IS NO DIFFERENCE BETWEEN THE POWERS OF THE PRESIDENT IN KAMAS SECURITIES AND THOSE IN THE PRESENT CASE, WHICH WOULD JUSTIFY APPLYING DIFFERENT LAW.

The first reason the Defendants-Respondents cited for distinguishing Kamas Securities was that in the Kamas Securities case the president was "'clothed with management of every department of the company.'" (R. 68). As the Plaintiff-Appellant pointed out in the lower Court (R. 73), there was no finding in the Kamas Securities case that the president of Kamas Securities Co. was "clothed... with the management of every department." 226 P.2d at 115.

As stated in the Kamas Securities case, this quote comes from the case of Greenbay Fish Co. vs. Jorgensen, 165 Wis. 548, 163 N.W. 142, 144. Id. at 115. It was apparently relied upon in Kamas Securities to support the principle from 2 Fletcher Encyclopedia of Corporations, Section 618, that "according to the more modern authorities, the president of the corporation has power to institute suits in its behalf." 226 P.2d at

115 quoting 2 Fletcher Cyc. Corp. Section 618. Contrary to the Defendants-Respondents' assertion that the president in the Kamas Securities case was "clothed with the management of every department," the Kamas Securities decision relies on no such fact. Rather, the Court opinion in this aspect dwells upon the fact that the status of the corporation and the governing board was rather shaky. ("there was a controversy among the directors" Id. at 115.) The focus in Kamas Securities was on the need, which was present for the president to bring the action, not upon the specific powers of the president. The Court's reasoning reflects this.

The Court in Kamas Securities did not attempt to show the president of Kamas Securities was "clothed... with the management of every department" and then conclude that the authority to instigate litigation was his. The Kamas Securities Court looked to the controversy in the corporation and determined that it was in the corporation's best interest that the president be allowed to file the suit. Any attempt to distinguish Kamas Securities from the present action on grounds that the powers granted to the president differed in each case would appear to be very tenuous indeed.

B. THE IRREPARABLE LOSS SUFFERED IN KAMAS SECURITIES IS A UNIFYING, RATHER THEN A DISTINGUISHING POINT, BETWEEN KAMAS SECURITIES AND THE CASE AT HAND.

The second reason presented to the lower Court upon which it could have relied to distinguish Kamas Securities was that "in Kamas the corporation would have suffered 'irreparable loss' in the Courts opinion if action would have been delayed."

(R. 68). The Defendants-Respondents position here apparently comes from the statement in Kamas Securities that " the president in this case was not required to obtain the consent of the Board of Directors, and had he deferred action until such consent had been procured the corporation might have suffered an irreparable loss." 226 P.2d at 115 (emphasis added). An examination of the reasoning and facts behind this position in Kamas Securities demonstrates that the irreparable loss in Kamas Securities was almost identical to that which the Plaintiff-Appellant claims here.

In Kamas, the Plaintiff corporation, through its president, sued the secretary for the unauthorized delivery of collateral held on a note of the corporation. The collateral for the note was delivered by the Defendant to his brother, who was liable on the note prior to the running of the statute of limitations. Because of the running of the statute of limitations on the note, the only means the Plaintiff corporation had to collect on the note was the collateral which it had held in its possession. Id. at 113. Delivery of the collateral by the Defendant to his brother destroyed the right which the corporation had to the collateral and thus their ability to collect on the note. Id. Accordingly, the Plaintiff corporation sued the secretary to make the corporation whole as to the loss of the collateral for the note.

As the foregoing facts demonstrate, the assets which the corporation was trying to preserve in Kamas Securities, the collateral for the loan, had already been lost. There would be no "irreparable loss," in terms of regaining the collateral.

which would result from waiting for a board meeting which would authorize the president to sue. The collateral was already gone.

Likewise, irreparable loss would not be incurred by waiting to sue the secretary of the corporation, as the Plaintiff corporation eventually did. The Court held that evidence showing the Defendant not to be a de jure officer would not effect the Plaintiffs right to recovery. Id. at 115.

Additionally, although there are certainly elements in the Kamas Securities showing that a dispute among members of the board existed, there was no finding by the Court in Kamas that a deadlock, such as that which exists in the instant case was present in Kamas, making it likely that the suit would never be brought and accordingly resulting in the loss of the corporate asset.

In short, in Kamas Securities there was no pressing need, which could be equated with "irreparable loss", that the corporate assets would be imminently endangered if the action of the president was postponed until a subsequent board meeting. The holding of Court in Kamas Securities, as to irreparable loss, therefore appears to refer to the proposition that an "executive officer is not required to wait for formal resolution" if such waiting "might have" the result of the corporation losing its assets. Id. at 115.

As the record demonstrates and the foregoing arguments

affirm, the Plaintiff-Appellant corporation is in precisely this situation. Due to the split of the four directors on the board, there is no possibility of a majority vote to compel the Dorius's to deliver title to the property for which Lloydona has paid. Thus, if the president of the corporation is not allowed to bring a suit at this time it is uncertain what will occur to Lloydona's interest in the property.

Further, any argument that the loss is not irreparable as it could be redressed by a derivative action suit was also dealt with in Kamas Securities. There, this Court specifically stated that "regardless of any findings to the effect that the suit was by a stockholder on behalf of the stockholders, this action was properly instituted by the corporation at the instance of the president." Id. at 115.

Thus, the second reason upon which the lower Court could have relied for distinguishing the Kamas Securities case from the one at hand provides very little substance for departure from that precedent.

C. KAMAS SECURITIES CANNOT BE DISTINGUISHED FROM THE PRESENT CASE ON THE BASIS OF THE NATURE OF THE BUSINESS INVOLVED.

The third possible reason offered for distinguishing Kamas is that the nature of the business in Kamas was ideally suited to this type of presidential action. (R. 68). Defendants-Respondents cite no aspect of the Kamas Securities case which makes reference to this contention. There is none.

To conclude, Plaintiff-Appellant's first argument shows

that the Kamas Securities case is aligned with the instant case on all major factual aspects. This argument demonstrates that the arguments of the Defendants-Respondents in the lower Court, upon which the Court must have relied, fail to distinguish Kamas Securities from the action here. Kamas Securities is valid, undisturbed precedent from this Court. The Judgment from the Court below, is directly contrary to that precedent and should be reversed.

III. THE AUTHORITIES UPON WHICH THE LOWER COURT COULD HAVE RELIED PROVIDE NO BASIS FOR THE OVERRULING OF THE KAMAS SECURITIES DECISION.

In the lower Court the Defendants-Respondents attempted to establish that the law in Utah was other than that in the Kamas Securities by citing three sources: (1) general statutory provisions from the Utah Code, (2) encyclopedic references, and (3) a case from the state of New York. (R. 13-16). None of these sources gives sufficient reason to overrule the Kamas Securities holding.

A. THE GENERAL STATUTORY PROVISIONS OF THE UTAH CODE PERTAINING TO CORPORATE MANAGEMENT PROVIDE NO BASIS FOR OVERRULING THE KAMAS SECURITIES DECISION.

The Defendants-Respondents cited the Utah Code Annotated Sections 16-10-33 and 16-10-45. (R. 13,14). These provisions state generally that the Board of Directors should manage the corporation and that the corporate officers should obtain their authority from the by-laws and resolutions of the board. The Plaintiff-Appellant does not dispute these general statements of corporate procedure nor does the Kamas Securities case argue against them. Kamas Securities merely provides the rule for

those unique fact situations where corporate assets are imperiled and action by the president is necessary to preserve them. The statutes in no way give grounds to overturn this Court's prior holding in Kamas Securities.

B. THE ENCYCLOPEDIA REFERENCES PRESENTED TO THE COURT BELOW PROVIDE AN INSUFFICIENT BASIS FOR OVERTURNING PRECEDENT FROM THIS COURT.

The Defendants-Respondents offered the lower Court numerous quotations from encyclopedic references to present its argument that the law in Utah is different from the law as stated by this Court in Kamas Securities. (R. 14-16). Each of these encyclopedic references falls within one of three categories which do not provide appropriate authority for the lower Court to depart from this Court's precedent.

First let it simply be stated that there is a split in the jurisdictions as to the power of the president to bring an action in behalf of the corporation in situations such as these. 2 Fletcher Cyc. Corp., Section 618. The quotations rendered by the Defendants-Respondents in the Court below reflect this. For example, Defendants-Respondents references read "it has been held" 19 Am. Jur. 2d Section 1157, "the strict rule layed down by some authorities" 19 Am. Jur. 2d Section 1169, "there is authority to the effect that" 19 Am. Jur. 2d Section 1190. (R. 15,16).

Plaintiff does not dispute the existence of contrary authority in other jurisdictions. It does dispute, however, that they constitute sufficient grounds for the lower Court to overturn the rule of law set forth by this Court in Kamas Securities.

To the extent that the encyclopedic references are not based upon authorities from other jurisdictions where the rule is different than that in Kamas Securities, they reflect (1) general statements of corporate law which the Plaintiff-Appellant does not dispute (19 Am. Jur. 2d Section 1156, 19 Am. Jur. 2d Section 1119) or (2) specific statements of situations which do not fit the facts at hand ("after refusal of a majority of the Board of Directors" 120 A.L.R. 2d Section 120) (there is a split on the board in Lloydona, not a refusal by majority.) (R. 14,15).

Thus, to the extent that the encyclopedic references reflect the law of the jurisdictions and general corporate principles, the Plaintiff-Appellant acknowledges their accuracy. Insofar as the authorities have been relied upon by the lower Court to depart from the specific holding of Utah case law, the Plaintiff-Appellant contends that such reliance is unjustified and error at law.

C. THE NEW YORK CASE OF STERLING INDUSTRIES VS. BALL BEARING PEN CORP., 298 N.Y. 483, 84 N.E. 2d 790 (1949) IS AN INADEQUATE SOURCE FOR REVERSAL OF KAMAS SECURITIES CO. VS. TAYLOR, 226 P.2d 111 (Utah 1950).

The final authority presented to the lower Court was Sterling Industries vs. Ball Bearing Pen Corp., 298 N.Y. 483, 84 N.E. 2d 790 (1949). Any reliance upon this authority to overturn Kamas Securities would be inadequate for a number of reasons.

First, as mentioned above, authority does exist in other jurisdictions for a rule different than that in Kamas Securities.

The New York case is one of those precedents. However, the mere existence of contrary authority should not result in a departure from Utah case law. No adequate policy reasons have been given for this departure.

Second, the facts in the Sterling Industries are significantly different from those in the case at hand. The Sterling Industries case did present a situation similar to Lloydona in that there were two sets of directors deadlocked as to what action to take. However, as the Plaintiff-Appellant pointed out in the Court below, there were specific corporate by-laws in the Sterling Industries case which covered the situation. The New York Court merely held that the by-laws were controlling and that an action by the president would not be allowed. In the instant action there are no applicable by-laws. Thus, on its facts, the Sterling Industries is easily distinguished from Lloydona.

Finally, it is interesting to note that by subsequent case law the New York Court of Appeals has greatly restricted its holding in Sterling Industries and given the corporate president the right to instigate litigation in situations similar to the one at hand. Rothman & Schnieder, Inc. vs. Beckerman 141 N.E. 2d 610, 613 (N.Y. 1957) ("when directors deadlock over corporate litigation and the president hires an attorney to sue or defend for the corporation he may proceed and recover compensation for his work.") (citations omitted); Westview Hills, Inc. vs. Lizau Realty Corp., 160 N.E. 2d 622, 624 (N.Y. 1959) ("absent the provisions in the by-laws or action by the Board of Directors prohibiting the Defendant from

defending and instituting suit in the name of and in behalf of the corporation, he must be deemed in the discharge of his duties, to have presumptive authority to so act.")

Plaintiff-Appellant therefore contends that case law from a New York Court, which has been restricted in its own jurisdiction and whose facts present significant differences from the case at hand, should not be authority to overturn applicable case law from this Court.

To conclude, none of the three authorities upon which the lower Court could have relied provide sufficient grounds to overturn this Courts prior holding in the Kamas Securities case.

IV. CASE LAW FROM OTHER JURISDICTIONS REINFORCES THE LAW IN THIS JURISDICTION THAT THE PRESIDENT HAS THE AUTHORITY TO SUE IN BEHALF OF THE CORPORATION.

As stated earlier, the jurisdictions are split as to whether the president of the corporation may instigate litigation in situations such as these. 2 Fletcher Cyc. Corp., Section 618. In Elblum Holding Company vs. Mintz, 1 A. 2d 204 (N. J. 1938) the stock of a Plaintiff corporation was "owned equally by two families who (were) at cross purposes with each other." This resulted in the "impossibility of securing corporate sanction to bring this suit." Id. at 205. The president of the corporation filed suit in behalf of the corporation and the Defendants challenged his right to do so. Id. These facts are almost identical to those presented in the case at hand.

Elblum Holding Co. pointed out that there was authority on both sides of the question presented. Yet it relied upon the earlier precedent in New Jersey that "a president of a corporation may in pursuit of the power incidental to his office take the steps in defense of litigation prosecuted against his corporation in order to preserve the corporate assets." Id. at 206. The Court further observed that "if the president were to fail to exercise the power to protect and defend the assets of his corporation, he might well be liable to his corporation for the result of losses." Id. at 207.

Plaintiff-Appellant suggests that this authority further strengthens the holding of Kamas Securities. This Courts holding in Kamas Securities is valid, undistrubed precedent which implements the specific public policy of allowing a corporate presiden to take necessary steps to protect and preserve corporate assets. This Court should maintain the precedent it established in Kamas Securities and reverse the lower Court's Judgment not allowing this action. Other jurisdictions confirm that this approach is appropriate.

CONCLUSION

For the reasons stated above the Judgment of the lower Court granting Defendants-Respondents' Motion to Dismiss should

be reversed and this case remanded to the lower Court for
a decision on the merits.

DATED this _____ day of December, 1981.

RESPECTFULLY SUBMITTED

ROMNEY, NELSON & CASSITY

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