

1982

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

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. ¹⁸⁰⁵⁹~~16594~~

BRIEF OF RESPONDENT

AN APPEAL BY PLAINTIFF - APPELLANT FROM A
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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IN THE SUPREME COURT OF THE
STATE OF UTAH

LLOYDONA PETERS ENTERPRISES,)	
INC.,)	
Plaintiff - Appellant,)	
vs.)	CASE NO. 16594
DALE M. DORIUS and DELORIS)	
P. DORIUS,)	
Defendants - Respondents.)	

DEFENDANTS - RESPONDENTS BRIEF

STATEMENT OF NATURE OF CASE

This is, on the part of the Defendants - Respondents, a motion to dismiss an illegal action filed by the president without corporate authority and her illegal use of and diversion of corporate funds to hire and pay her attorney and the depositing of a large sum of corporate funds into court, where interest would not be earned thereon.

DISPOSTION IN THE LOWER COURT

The Lower Court held that the president of the corporation does not have the implied power or the inherent power to institute this litigation in the name of the corporation and granted defendants' motion to dismiss.

RELIEF SOUGHT BY DEFENDANT - RESPONDENTS ON APPEAL

Defendants - Respondents seek to have the decision of the lower court sustained.

STATEMENT OF FACTS

On the 6th day of December, 1971 Dale M. Dorius and wife, Deloris, purchased on contract for \$19,000.00 a small office building on Main Street in Brigham City, Utah, which contract was held in escrow in the First Security Bank of Brigham City. (R006).

Immediately thereafter the Lloydona Peters Enterprises, Inc. sought and was granted the right to participate in the purchase of said building, which was used as an office building by the Dorius'. This contract was eventually paid for in the year 1978 and the Dorius' sought to buy out the corporation's interest and on October 17, 1978 a corporate resolution was passed (R021) part of which states:

"The Dorius to buy out 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."

The board of directors and shareholders passed a resolution on January 30, 1979 (R025 second part of paragraph 5) which states in part:

"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."

The Christensen appraisal was the independent appraisal arranged by Jean Hull, the president of this corporation, and the Christensen appraisal was higher than the Miller Realty appraisal arranged by Dale M. Dorius.

On or about February 1, 1979 Dale M. Dorius tendered to the treasurer of said corporation a check in the sum of \$14,000.00 representing payment of the corporation's equity in accordance with the Christensen appraisal approved by the corporation and the same was deposited by the treasurer in the funds of the corporation in a savings account.

The four sisters, to-wit: Gay P. Driggs, Jean P. Hull, Joy P. McKell and Doloris P. Dorius, equally own the corporation known as Lloydona Peters Enterprises, Inc. These four sisters, together with their husbands, are the owners of another corporation known as Cedar Springs Ranch, Inc. where an action was brought several years ago, to-wit: April 14, 1976 under Rule 23.1 of the Utah Rules of Civil Procedure entitled "Derivative Action by Shareholders". This being Civil No. 13427 in the District Court of Box Elder County, Utah and this litigation has divided the family and it has not, as yet, reached a trial.

On June 12, 1981, without corporate authority, Jean Hull, as president only, withdrew from the corporate savings account located at Ogden First Federal Savings and Loan the sum of \$18,000.00. (R026). She deposited this \$18,000.00 in the First Security Bank, a bank not authorized or approved by the corporation. The deposit was made in a checking account in the name of the corporation with Jean P. Hull president and Joy P. McKell vice-president as

authorized to withdraw said funds. (R027). On July 22, 1981 Jean Hull withdrew \$2,000.00 by making a check payable to her attorney Donn E. Cassity. (R028). On July 6, 1981 Jean Hull withdrew by check the sum of \$15,838.40 payable to the Clerk of Box Elder County Court. (R029), all without corporation authorization and in direct violation of the corporate resolution, to-wit: The corporation had held a meeting on August 28, 1980 and passed the following resolution:

"Two signatures be required on checks by the president and treasurer." (R030 second paragraph).

On the 6th day of July, 1981 a Complaint and Summons was served in this matter on Dale M. Dorius and Deloris P. Dorius and signed by Jean P. Hull and her acknowledgment reads:

"I, Jean P. Hull being duly sworn on oath state:

1. That I am the president of the plaintiff corporation Lloydona Peters Enterprises, Inc., a Utah Corporation.

2. That I have read this Complaint and know its contents, that the facts stated therein are true of my own knowledge excepting as to those things of which I have been informed, which things I also believe to be true."

Said acknowledgement not being an acknowledgement generally used by a corporation wherein it might state that she was authorized and directed to bring such suit in behalf of said corporation.

Deloris P. Dorius in her Affidavit (R034) says that she is the duly elected secretary of said corporation and in

paragraph 7 thereof she recites that the said Jean P. Hull, existing president, has never requested authority from the shareholders and directors to instigate litigation, employ legal counsel or expend corporate funds and the secretary further states in paragraph 12 of her Affidavit (R-036) Jean Hull's action in filing a Complaint in behalf of the corporation, withdrawing monies earning interest on savings and depositing said funds to checking in an unauthorized bank, earning no interest, changing signature cards and expending funds on her own legal counsel, have all been done without corporate approval or authorization and in direct violation of corporate resolutions and further she says in paragraph 13:

"The lawsuit filed by Jean Hull is not brought to preserve corporate assets and interest. Said lawsuit is brought solely for the purpose of harrassment and in disregard of corporate resolution."

All of this matter and background was presented to the Lower Court when the motion to dismiss was presented and all facets of the facts involved were presented by both parties to the court below and the Lower Court, after wading through the many, many sheets of the paper work involving affidavits, exhibits, etc., the court held that the president of the corporation, under the facts, was not authorized to bring this action.

ARGUMENT

POINT I

THE CORPORATION PRESIDENT, JEAN P. HULL, UNDER THE FACTS IN THIS CASE, IS WITHOUT EXPRESS OR IMPLIED AUTHORITY TO INSTIGATE LITIGATION, EMPLOY COUNSEL, TRANSFER FUNDS AND EXPEND CORPORATE FUNDS WITHOUT APPROVAL AND DIRECTION BY A MAJORITY ACTION OF THE BOARD OF DIRECTORS.

The original contract which was in escrow with the First Security Bank is in the name of Dale M. Dorius and I. Deloris Dorius buying the same from Morgan Investment Company, a Utah Corporation. (R006) A copy of which contract is attached to plaintiff's original Complaint. There evidently was an oral contract as referred to on page 2, paragraph 6 of plaintiff's Complaint that the plaintiff would participate in the purchase of said property. The only Minutes that we have in this are as follows: (October 17, 1978 paragraph 7) (R021) which reads as follows:

"7 - 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 a realtor in Ogden. Monthly payment for the office has been \$240.35. The papers concerning the financial agreements between Lloydona and Dorius are in escrow until final payment. Stockholders will receive a copy of the agreement when the final payment has been made and the Dorius' have received the paper 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."

The Minutes of January 30, 1979, (R024) paragraph 5 reads as follows:

"Office building. Jean and Joy requested that 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 the 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."

The corporate Minutes of August 28, 1980 (R030) meeting and the second paragraph thereof reads as follows:

"The Minutes of the last corporation meeting held November 5, 1979 was read by the secretary, Deloris P. Dorius, and the following corrections were made:

Paragraph 7: Two signatures be required on checks by the president and treasurer."

And the further Minutes on said day and particularly paragraph 9, reads as follows:

"Office building - Joy wanted the following written up in the Minutes: Jean and Joy state that the \$14,000.00 should not be distributed as they feel the transaction has not been accepted or is acceptable until additional monies have been received. Deloris wanted the following written up in the Minutes: Gay and Deloris feel that the transaction has been accepted and completed."

The overall picture as shown by these Minutes is that from the very start it was intended that after the building

was paid for that the equity of the corporation would be determined and the Dorius' would pay to the corporation its equity so that the investment that the corporation had made in the matter would be compensated for and the Dorius' would be able to continue to use the office.

As time went on the parties drew apart because of other litigation. Then all of a sudden the plaintiff, Jean Hull, without any notice or without any authority from the corporate officers or without bringing it up or discussing it at any corporate meeting, takes it upon herself, no doubt with the advice of counsel, to draw out \$18,000.00 of corporate money that is on savings at a saving institution, pay her counsel \$2,000.00 as a retainer, deposit with the court the sum of \$15,838.00, no doubt being the \$14,000.00 plus \$1,838.40 interest earned thereon and seek to cancel the settlement of the corporation's interest paid by the Dorius'. There was no attempt at said time to have the property further appraised. If it had been and the new appraisal showed that the corporation's equity was greater than the \$14,000.00 that had been deposited some nearly two years' before for its interest, the amount would have been small and could be easily compromised. There was, however, no demand through the officers of said corporation or an attempt to get the officers of said corporation to have further appraisal and accounting. There was no possibility of a loss to the corporation of any monetary

value. It had received \$14,000.00 and all it could claim would be the difference, if a new appraisal would increase their claimed amount above the \$14,000.00. This was real property, it could not take flight. No attempt had been made by anyone to cloud it's title. The original contract was made in the Dorius' name. The corporation's interest had always been recognized. It was not something that was subject to being outlawed by any statute of limitations in the immediate future. It was something that could be arbitrated and handled if there was any desire on the part of the plaintiff to so do. On the other hand, if Jean P. Hull wished to be malicious and create expense in litigation, then the actions she took would certainly help her to carry it out.

The articles of the incorporation of Lloydona Peters Enterprises, Inc. Corporation vests the corporate authority in the board of directors. The corporation has not adopted By-Laws for the regulation of the internal affairs of the corporation and therefore, is controlled by its Articles of Incorporation and by the Business Corporation Act U.C.A. 1950 Section 16-10-33 reads in part:

" . . Board of Directors - the business and affairs of a corporation shall be managed by the board of directors."

The corporation has managed its affairs since its inception in 1971 by resolution of the board of directors which are each equal shareholders. The president is not in

charge of managing corporate affairs, nor has the president been authorized by the shareholders or directors to instigate said lawsuit. The president, in her Complaint, has not alleged any eminent danger to a corporate right; the property in question having been paid for over two years ago. Further, the nature of the corporation business is not one which would imply a power of the president to instigate litigation.

Utah Code Annotated, 16-10-45 in part states:

"All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided in the bylaws, or as may be determined by resolution of the Board of Directors not inconsistent with the bylaws"

In 10 ALR 2d 705 Section 2 states:

"Thus it would appear that when the management and control of the business is in the directors and no corporate bylaws confers upon the President the power to start suit, there is no implied power in the latter to do so."

Further, 10 ALR 2d 705 Section 3 further states:

"Except for the rule which seems to have been adopted in the case of banks a survey of the cases indicate there is no inherent power in the President of a corporation to instigate litigation on its behalf simply by virtue of his office."

Further, in 1-100 ALR 2d Digest Section 120 Page 453 it states:

"The authority of a corporate President to have litigation instituted by the corporation after refusal of a majority of the Board of Directors to sanction such institution cannot be upheld on the theory that the particular litigation in question represents an emergency or critical situation in the corporate affairs, where there is no allegation or proof of evidentiary facts showing the existence of such a condition."

The case of Sterling Industries vs Ball Bearing Pen Corp., 298 NY 483, 84 NE 2d 790 is directly in point with the case at hand. The Sterling Corporation was formed in 1946, by two groups of men who were to share equally in its control. The bylaws of said corporation contained no reference to any authority on the part of the president or any other officer to instigate litigation. The court held in the Sterling case as follows:

"The question presented for our consideration, therefore, is whether a president of a corporation may institute an action under the circumstances disclosed on the record after he has asked his Board of Directors for permission to do so and it has been refused. We think he may not . . ."

Further, in the Sterling case the Court held:

"We have consistently held that Section 27 of the General Corporation Law, which provides that the business of the corporation shall be managed by its Board of Directors, cannot be circumvented."

The President of Plaintiff Lloydona Peters Enterprises, Inc., does not verify her complaint that she is acting under any authority of the Board of Directors.

Also, in 19 Am Jur 2nd Section 1156 on page 584, we have:

"Employment of Counsel. Since the directors ordinarily are the governing body of a corporation, it is generally held, in the absence of some express restrictions in the bylaws, that they have the power to hire and employ counsel on behalf of the corporation . . . However, where the directors were divided into two contesting groups, each attempting to exercise the functions of a Board of Directors, the employment of counsel for the corporation by one faction to recover amounts allegedly due on stock subscriptions and to cancel certain shares without notice to, and in the absence of, the other members was held without

authorization. And it has been held that one of the two directors of a corporation had no power alone, as a director, to enter into a contract for the employment of counsel on behalf of the corporation, to defend it against the stockholders suit for the appointment of a receiver."

Also under Section 1157, page 585 of 19 AmJr 2nd we have in the second paragraph thereof:

"It has been held that one director cannot on his own initiative institute a suit on behalf of the corporation."

Again, in 19 AmJur 2nd, Section 1119, page 555 we have necessity of meeting or collective action, generally.

"As a general rule, the authority of directors or trustees is conferred upon them as a board, and they can bind the corporation only by acting together as a board. A majority of them in their individual names cannot act for the board itself and bind the corporation. In order to exercise their powers they must meet so that they may hear each others views, deliberate and then decide. They must act as an official body."

Again, on the next page and under the same Section, we have:

"As a consequence, a single director of a corporation as such has no power to act in a representative capacity for the corporation; nor has he general authority to make contracts for the corporation, there is no presumption that a contract purporting to be made by him was authorized by the corporation, even though he owns a majority of the corporate stock."

Again in 19 AmJur 2nd, Page 595 under Section 1169 under the title President, we have:

"The strict rule layed down by some authorities is that the President of a corporation has, by virtue of his office, no inherent power to act for the corporation. His authority must be derived from the corporation or Board of Directors, or by statute. According to other authorities the President of a corporation may have certain inherent authority, but it is not clearly

defined and seems to be quite limited, as will readily be seen from a consideration of his inherent power to do particular acts."

Again, in 19 AmJur 2nd, Page 611 under Section 1190 under the heading Conducting or Instituting Litigation we have:

"There is authority to the effect that there is no inherent power of the president of a corporation to institute litigation on its behalf simply by virtue of his office. However there is some authority to the contrary, at least in the case of large business corporations and an exception appears to exist in the case of banking corporations."

Plaintiff and her counsel know because they are now involved in another action with some of the same individuals, which action was claimed to be instituted under Rule 23.1 entitled Derivative Actions by a Shareholder, that she could have filed said action as an individual if she could comply with said Rule 23.1. If she filed under said section, then she would have to file individually as plaintiff, which would give the defendants, which she so named, the right to counterclaim against her personally for any damage that they might sustain if she were in the wrong in filing said action, such as where she has diverted corporate funds, placed them in another bank account under her control and then went out and paid a \$2,000.00 retainer fee to counsel, that she chooses without corporate action, and attempts on her own to rescind a corporate matter that approximately two years ago has been settled. Then on her own initiative, transfers corporate funds into her own

control and deposits a check against said funds under her control with the court. All of said actions by the plaintiff and her counsel are contrary to good law and business practice. Also, the real plaintiff, Jean P. Hull, has no authority, actual or implied, to hire counsel and file said action. That as a result thereof the said Complaint fails to state a claim upon which relief can be granted and the said action should be dismissed.

POINT II

THE CASE OF KAMAS SECURITIES CO. V. TAYLOR, 226 P2d 111 (UTAH) 1950 RELIED ON BY PLAINTIFF HAS NOTHING IN COMMON WITH PLAINTIFF'S ACTIONS.

In the Kamas case we have as principals the defendant Moses C. Taylor, the Kamas Securities secretary who was sued for wrongful surrender to a defaulting debtor (his brother Elliott C. Taylor) 30 shares of bank stock pledged as security for payment of promissory notes executed by the brother, which notes were owned by plaintiff.

The defendant over the years had delayed the corporation and its officers from taking action on the notes until they became outlawed, the last one on January 2, 1942 (page 113 right column).

While the notes had become outlawed and suit could not be filed to collect the amounts due on them the stock given as a pledge did not come under this restraint. (page 113, right column).

In 1946, after discussions had been going on for several months about taking a transfer of the stock and cancelling the debt of Elliot C. Taylor, the defendant was approached by plaintiff's attorney and we have on page 114 right hand column:

"Defendant then informed him for the first time that the stock had been surrendered to Elliott. When asked why, defendant said that the notes had been outlawed by statute of limitations. This suit was commenced in October, 1946, several months after counsel learned of the surrender of the notes. The action was brought in the name of the corporation, and the complaint was verified by A. W. Farr as president."

At this point the stock as pledge had been, without authority, secretly given back to Elliott. It was no longer there to foreclose on and the court said: (Page 115, left column)

"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 dissipation."

While this case does not make clear what authority the president A. W. Farr might have had as the executive officer, to carry on this Kamas Security Co. business. One of the cases that was submitted in support of the president's actions makes one believe he had full authority to file the suit which is: (Page 115, right column)

"In Green Bay Fish Co. v. Jorgensen, 165 Wis. 578, 163 N.W. 142, 144, the court declared: "There is no need that express authority to commence such an action should be given by the board of directors to a president who is clothed by the charter or by-laws of the corporation with the management of every department of the company."

In our case there are no by-laws giving the president any power to do what she has done. In the absence of by-laws the state law provides (sec. 16-10-33 and 16-10-45 supra) how the business is to be carried on. Also this little family corporation is dealing with just one investment on a matter involving an equity in real property and it is not in danger of dissipation.

The court again said in the Kamas case (page 115, right column):

"The president in this case was not required to obtain 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."

We do not have anything like that in this case. This little family corporation (four sisters) is dealing on an equity in a piece of real property and the only thing that hasn't satisfied the president is that she believes that the \$14,000.00 deposited with the treasurer of the corporation by Dorius' almost two years before she files suit, which figure was arrived at by the use of an appraiser she employed, should possibly be higher. She has never stated or declared how much higher. She has not attempted to arbitrate. She has hired an attorney, the one involved in the other family dispute, drawn out corporate monies in a method contrary to corporate direction, paid part of the corporate money to-wit: \$2,000.00 to the attorney so chosen by her as a retainer. She knows the other side must spend

money to defend. The amount of any difference in any new appraisalment when the corporation gets only half of it will no doubt be less than the retainer she has paid with corporate funds.

CONCLUSION

This small corporation, owned by the four sisters on an equal one-fourth share to each sister has been operated from its inception by the four as directors. The corporation has no by-laws. Each sister has in addition to the title of director, an additional title such as; one is the President, one is the Vice-President, one is the Secretary and one is the Treasurer. These latter titles can be changed or rotated at any annual meeting. The property that makes up the assets of the corporation is the inherited property, house and orchard lands of their mother, Lloydona Peters in Perry, Utah, hence the name of the corporation was chosen as Lloydona Peters Enterprises, Inc. The property involved in the lawsuit is an agreed upon investment in an office building that was being purchased by the Dorius' and the corporation wanted to participate up to one-half, which it did. At the end of the contract the property was appraised by two appraisers to determine its value so as to determine the equity of the corporation. The highest appraisalment, made by the appraiser for the present President was used and the corporation was paid February 1, 1979, \$14,000.00 pursuant to the high appraisalment for the corporation's

equity. Some two years thereafter all corporate rights were completely disregarded by Jean P. Hull and this suit was commenced without any authority. A Motion to Dismiss and Points and Authorities were filed and each side thereafter filed additional Points and Authorities and Exhibits. When it was submitted to the District Judge he held:

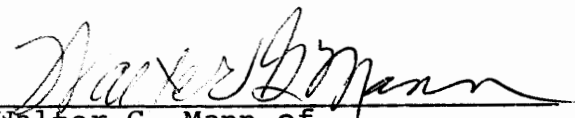
"Based on the pleadings, the memoranda, and affidavits on file herein, I find that the control and management of the plaintiff corporation is in the directors, and they alone may authorize the institution of litigation. That the president thereof does not have the implied power or the inherent power to institute this litigation in the name of the plaintiff corporation.

Defendants' Motion to Dismiss is granted."

We ask this court to sustain the lower court's decision.

DATED this 22 day of January, 1982.

Respectfully submitted


Walter G. Mann of
Mann, Hadfield & Thorne
Attorney for Defendants -
Respondents