

1982

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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LLOYDONA PETERS	)	
ENTERPRISES, INC.,	)	
	)	
Plaintiff - Appellant,	)	
	)	
vs.	)	CASE NO. 18059
	)	
DALE M. DORIUS and	)	
DELORIS P. DORIUS,	)	
	)	
Defendants - Respondents	)	

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REPLY BRIEF OF APPELLANT

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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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REPLY BRIEF OF APPELLANT

Pursuant to Rule 75(1), Utah Rules of Civil Procedure, the Appellant herewith files this Reply Brief.

The Appellant, Lloydona Peters Enterprises, Inc., sets forth this Supplemental Statement of Facts, the Respondents Statement of Facts being both incomplete and inaccurate. Appellant incorporates with this Supplemental Statement of Facts the Statement of Facts in its original brief.

SUPPLEMENTAL STATEMENT OF FACTS

Respondents, at page 2 of their brief, state that "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'." Appellant must point out, however, that the original verbal agreement

between Lloydona and the Respondents was that each would pay for and own an undivided one-half interest in the building and property. (R. at 002, para 6; R. at 054, 056).

The importance of this fact is that Respondents now claim (Respondents brief, page 8) that Lloydona simply made an investment in the property that it was later to receive a 10% percent return on, this apparently to disclaim any actual ownership by Lloydona of an undivided one-half interest in the property. The record makes clear that all the parties involved knew that Lloydona did own an undivided one-half interest. (R. at 053, 054).

No deed or evidence of title was ever given to Lloydona by Respondents, as was agreed should happen upon final payment on the building. (R. at 038, para 7; R. at 053, 054).

Respondents, at page 3 of their brief, also state that Respondent Dale M. Dorius tendered a check for \$14,000.00 to Lloydona's treasurer, Gay Driggs. Respondents fail to mention, however, that the four directors of Lloydona had never reached an agreement as to the sale of the property. (R. at 053 - 062). The four director-sisters were deadlocked two-two on whether to sell at that time and for that price. (R. at 025). The tender of the \$14,000.00 by Respondent Dorius and the acceptance

of the same by the treasurer, Gay Driggs, who has aligned herself with the Respondents throughout this dispute, was a transaction wholly unauthorized by the corporation and merely constituted an unlawful attempt on behalf of Respondents to obtain Appellant's one-half interest in the property for almost what it cost eight years earlier at the time of purchase.

REPLY TO POINT ONE OF RESPONDENTS BRIEF

At issue here is whether Jean Hull, as President of Lloydona Peters Enterprises, Inc., had implied authority to bring the present action. Respondents first attempt to show in their Point I that there was no need for Lloydona's President to bring this action because the sale of the property to the Dorius' had already been transacted with all the parties' approval and consent, and that now Lloydona simply wishes to rescind that sale. Secondly, Respondents argue that even though there might have been a need to bring this action, as a matter of law there is no such authority in Lloydona's President to do so anyway. The former contention is primarily factual; the latter primarily legal.

Regarding the former contention - that there was no need to bring this action since the sale of the property was completed - the Court, in reviewing a motion to dismiss, must view the facts in the light most favorable to the non-moving



party. First National Bank of Nevada vs. Ron Rudin Realty Company, 623 P.2d 558 (Nev. 1981). The record clearly shows that Lloydona's President had abundant need to bring this action. Lloydona was contemplating selling its one-half interest in the property on Main Street in Brigham City. Lloydona's requests for title and deed to the one-half interest were denied by the Respondents. (R. at 054). Two of Lloydona's four directors felt unable to transact the sale without such documents and refused to do so. (R. at 054). No price for the property had been agreed to. (R. at 038). Nevertheless, Lloydona's treasurer accepted payment from the Respondents without corporate approval and over the strenuous objections of two of the four corporate directors. (R. at 049). Given these facts, which, if left uncontested would result in the immediate loss to Lloydona of its real property interest, Lloydona's President had no other means of protecting Lloydona's property interest than to file this action.

Respondents latter argument, that as a matter of law Lloydona's president did not have the appropriate authority to file this action, has been answered in Appellant's Brief filed herein. The case of Kamas Securities Co. vs. Taylor, 226 P.2d 111 (Utah 1950) is controlling here and grants the corporate president the power to act as she did in instigating this litigation. (See Appellant's Brief, pp. 6-16).

Kamas does not, as Respondents suggest in page 11 of their brief, require, procedurally, that the President of a corporation "verify" that he or she is acting under the authority of the Board of Directors. The only procedural steps which Kamas requires, after the showing of irreparable harm is made, are (1) that the action be brought in the name of the corporation and (2) that the Complaint be verified by the Corporation's President. 226 P.2d at 114. Appellant Lloydona has satisfied both requirements. (R. at 02, para 2).

In conclusion, there was both a need for instigation of this action, and the implied power in Lloydonas' President to do so to protect corporate assets and rights.

REPLY TO POINT TWO OF RESPONDENTS BRIEF

Respondent further asserts, in its Point II, that Kamas is distinguishable from the instant case. The Brief of Appellant has already demonstrated the opposite to be true.

Respondent, in its brief page 16, attempts to distinguish Kamas by stating that the real property in question is not in danger of dissipation. True; but Lloydonas interest in it is. Lloydona's President had to act to protect that interest.

Further, Respondents attempt to minimize their own misconduct and characterize this matter as a mere family

squabble: "This little family corporation is dealing with just one investment on a matter involving an equity in real property . . . ." Also: "This little family corporation (four sisters) is dealing on an equity in a piece of real property . . . ." An attempt to minimize the scale of the dispute, however, does not lessen the reality of the loss that will occur to the corporation if the President is not allowed to act on its behalf and preserve its real property assets.

Finally, sound public policy supports the rule which the Court adopted in Kamas Securities. Where the president of a corporation, especially a closed corporation, must act to prevent the loss of corporate assets or rights but would be prevented by either (1) the inaction of corporate directors or, (2) a deadlock among corporate directors, the implied power to instigate legal action allows the President to protect such assets or rights on behalf of the corporation. The rule thus allows the closed corporation to protect itself in times of dispute, deadlock or other necessary situations. It should remain intact.

#### CONCLUSION

In reviewing a motion to dismiss the Court must look at the facts in the light most favorable to the non-moving party. In the instant case this means that the Court must find (1) there is no corporate agreement for Lloydona to sell the property to the Respondents for \$14,000.00. (2) Lloydona will accordingly suffer irreparable loss if the sale is permitted to stand.

On these facts, Utah case law is clear. The corporate president has the authority, and more than likely the duty, to bring proceedings to halt the unauthorized dissipation of corporate assets. Kamas Securities is clear and uncontroverted authority which states that principle.

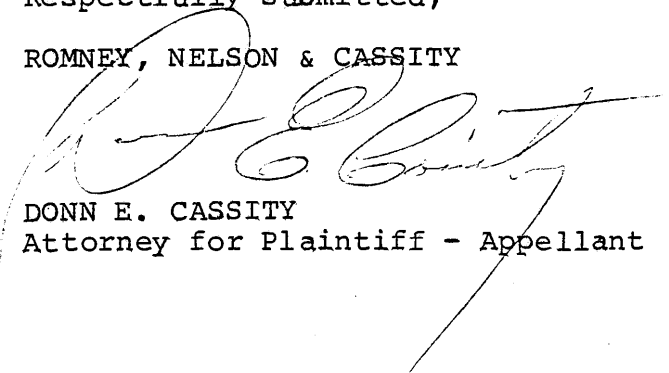
Further, the rule is grounded in sound public policy. Without such a holding, deadlocked close corporations would not have authorized means of taking action at times when their rights or interests are imperiled.

Accordingly, Appellant respectfully urges this Court to reverse the Order of the lower Court granting the Respondents' Motion to Dismiss and to allow this case to be heard on the merits.

DATED this 27<sup>th</sup> day of July, 1982.

Respectfully submitted,

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