1983

Lloydona Peters Enterprises, Inc. v. Dale M. Dorius and Deloris P. Dorius : Brief of Defendants-Respondents in Objection to Rehearing

Utah Supreme Court

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Walter G. Mann; Attorneys for Defendants and Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYDONA PETERS ENTERPRISES, INC.,

Plaintiff and Appellant,

-vs-

DALE M. DORIUS and DELORIS P. DORIUS,

Defendants and Respondents.

Case No. ~~16594~~ 18059

BRIEF OF DEFENDANTS - RESPONDENTS

IN OBJECTION TO REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED — PAGE(S)

TREATISES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYDONA PETERS ENTERPRISES, INC., Plaintiff and Appellant,	)	
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STATEMENT OF FACTS

Plaintiff Lloydona Peters Enterprises, Inc. (LPE), appeals the trial court's dismissal of its action for specific performance of an alleged contract to convey to it an interest in real property owned by defendants. At issue on appeal is whether Jean P. Hull, president of LPE, held authority to initiate this action on its behalf.

LPE is owned by four sisters, one of whom is defendant DeLoris P. Dorius. The corporation's assets consist of real property inherited from their mother, Dona Peters. Each sister holds an equal share in the stock of the corporation and each serves as a director and officer.

In December, 1971, defendants DeLoris P. Dorius and her husband Dale purchased an office building for which LPE agreed to pay a portion of the purchase price. At that time, the seller of the building placed in escrow a warranty deed showing defendants as title holders of the building. According to Hull, the escrowed documents also included an agreement on the part of defendants to convey to LPE an undivided one-half interest in the property upon final payment. Thereafter, defendants and LPE each made regular payments on the property, contributing approximately equal amounts toward the purchase price.

In 1978, in anticipation of completion of payment on the office building property, LPE and defendants began to discuss the possibility of sale of LPE's interest in the property to defendants. At their annual meeting on October 17, 1978, LPE's directors resolved to obtain two appraisals of the property and to then "meet with Dale and decide on a price."

According to the minutes of that meeting, the directors intended to "contact Joy [P. McKell, vice president and director of LPE] and confer with her before a final decision is made."

Following appraisal of the property, defendants tendered to Gay P. Driggs, treasurer and director of LPE, a check in the amount of $14,000, allegedly representing the value of LPE's interest in the property according to the higher of the two appraisals. The minutes of a January 30, 1979 directors' meeting show that all four of the directors recognized this appraisal as valid. However, two of the four directors, Hull and McKell, remained undetermined as to whether to sell LPE's interest at the tendered price. In contravention of the expressed wishes of these two directors, Driggs deposited the check in LPE's bank account. Thereafter, defendants recognized no interest in the office building property on the part of LPE.

Approximately two and one-half years after payment of the $14,000, without authorization from LPE's board of directors, Hull withdrew from the corporation account $15,838 representing the original $14,000 plus two years' interest.

After using $2,000 of this money to retain legal counsel, Hull deposited $13,838 with the district court and filed a complaint seeking a warranty deed to an undivided one-half interest in the office building along with general and punitive damages. The complaint included the following allegation:

> That this Complaint is verified by Jean P. Hull, President of Lloydona Enterprises, Inc., and said action is brought on behalf of the said corporation to preserve corporate assets and interests.

Defendants countered with a motion to dismiss, claiming that Hull had no authority to initiate litigation on behalf of LPE.

The trial court granted defendants' motion, stating:

> I find that the control and management of the Plaintiff corporation is [sic] in the directors, and they alone may authorize the institution of litigation. . . . [T]he president thereof does not have the implied power or the inherent power to institute this litigation in the name of the plaintiff corporation.

Plaintiff appealed this decision to this Court, in its decision, filed February 10, 1983, this Court affirmed the lower court decision. Plaintiff-Appellant now seeks a re-hearing of the appeal.

QUESTIONS PRESENTED

May the president of a corporation institute a civil action when the Board of Directors is unwilling to consent to such an action by a majority vote.

Under the facts of this case is there a genuine and imminent risk to a significant corporate asset which will be irreparably impaired.

Should this Court consider the merit of the underlying cause of action when considering an appeal of a dismissal for lack of authority to bring an action on behalf of a corporation.

ARGUMENT

POINT I

ANY DEADLOCK WHICH MAY EXIST AMONG THE BOARD OF DIRECTORS DOES NOT JUSTIFY ONE MEMBER CIRCUMVENTING THE BOARD AND THE APPLICABLE STATUTES TO BRING A CIVIL ACTION.

Plaintiff-Appellant in its petition for re-hearing asserts that this Court failed to consider the inability of the board of directors to take any action concerning this subject matter because of the deadlock which exists between its members. This

does not accurately portray the situation which exists. It would be more accurate to state that the board of LPE is unwilling to take the action which its President is in favor of. Utah Code Annotated sections 16-10-33, 16-10-38 and 16-10-45 (1953 as amended) vest the management of the corporation in the board of directors and define what constitutes an action by the board. LPE's President in bringing this action seeks to circumvent this process simply because her own will has been frustrated by the unwillingness of half of the board to support her decision. Certainly this Court had this in mind when it quoted from its earlier decision in Lochwitz v. Pine Trees Mining & Milling, 37 U. 349, 169 P. 168 (1917) and stated:

> The board of directors to whom the authority to bind the corporation is committed is not the individual directors scattered here and there, . . . but it is the board sitting and consulting together in a body. Individual directors, or any number of them less than a quorum, have no authority as directors to bind the corporation.

POINT II

THE VALIDITY OF PLAINTIFF-APPELLANT'S UNDERLYING ACTION IS NOT AN ISSUE BEFORE THE COURT.

Appellant further cites as error in its Petition for re-hearing that this Court failed to consider the merits of the underlying cause of action.

As correctly noted by Ms. Justice Durham in her dissenting opinion the trial court is required to accept the facts as alleged in the Complaint as true for the purpose of considering a motion to dismiss. However, Defendants motion to dismiss was not based on the failure of Plaintiff to allege sufficient facts to sustain a cause of action but rather on the inappropriateness of the action without the resolution in support of the board of directors. The trial court did not make an adjudication upon the merits and this Court in its majority opinion was not ruling upon the merits but rather upon the correctness of the trial court's decision granting Defendants' motion to dismiss. This Court held that even if the facts as alleged in the Complaint were true it would not warrant a deviation from the rules of law governing the management of corporate affairs.

POINT III

THE COURT RULED PROPERLY IN DETERMINING THAT THE FACTS OF THIS CASE DO NOT WARRANT A DEVIATION FROM THE GENERAL RULES GOVERNING A CORPORATE PRESIDENT'S POWERS.

Finally Appellant cites as error that this Court failed to distinguish the risk to a significant asset presented in this case from that in Kamas Securities Co. v. Taylor, 226 P. 2d 111 (Ut. 1950). On the contrary this Court in its majority opinion held that there was no imminent risk of irreparable loss to a significant corporate asset in this case.

The authorities are overwhelmingly in support of the rule that a corporate president, absent implied or inherent power to do so, is not empowered to bring a civil action without the resolution in support of the board of directors. (see 10 A.L.R. 2d Pg. 705 §§ 2 & 3; 19 Am.Jur. 2d pgs. 584-611 §§ 1156, 1157, 1119, 1169, & 1190. Sterling Industries Inc. v. Ball Bearing Pen Corp., 298 NY 483, 84 NE 2d 790 (1949) Indeed this court in Lochwitz, supra, has adopted this rule. The Kamas, case supra, is considered an exception to this rule. An exception which is made upon specific factual circumstances which are not presented in this case. In Kamas, supra, the corporation was faced with the loss of an asset which it would be unable to recover due to the statute of limitations. The board in Kamas, would not have been able to meet in time to act to protect that asset. This is simply not the case in

this action. Some two and one-half years elapsed between the time that the transaction complained of occurred and the time the suit was brought. This could hardly be compared to the imminent danger present in Kamas. Further this Court held that whereas LPE had received payment of $14,000.00 for the property in question the risk of loss was minimized greatly. In addition this is not a situation where because of time constraints the board is unable to take an action which it is likely to take; but rather a situation where the board having met has not voted to take the action. This Court held that the facts of this case do not justify a deviation from the general rule stated above.

CONCLUSION

This Court has previously considered the points of error assigned by Plaintiff in its Petition and has made a sound determination that Plaintiff is not entitled to the relief it seeks on appeal. A proper application of the appropriate rules of law will not change this outcome. Rehearing should therefore be denied.

DATED this 29 day of March, 1983.

Respectfully submitted.

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CERTIFICATE OF MAILING

SERVED the foregoing Brief of Respondents by mailing two copies thereof, postage prepaid, to DONN E. CASSITY and MICHAEL R. MUELLER, of Romney, Nelson & Cassity, Attorneys for Plaintiff and Appellant, at 136 East South Temple, Suite 900, University Club Bldg., Salt Lake City, Utah 84111, this 29 day of March, 1983.

WALTER G. MANN