1983

Lloydona Peters Enterprises, Inc. v. Dale M. Dorius and Deloris P. Dorius : Brief of Appellant in Support of Petition for 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-Appellant,	)	
	)	CASE NO. 16594
vs.	)	
DALE M. DORIUS and DELORIS P. DORIUS, Defendants-Respondents.	)	

BRIEF OF APPELLANT IN SUPPORT OF PETITION FOR REHEARING

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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 actoin 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 ajudication on the merits.

RELIEF SOUGHT ON REHEARING

Plaintiff-Appellant seeks a rehearing before the Court wherein it will seek a reversal of the lower Courts judgment of dismissal.

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 i spite of the Plaintiff-Appellant corporaton'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 corporatoin 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. THERE IS NO SUBSTANTIAL FACTUAL DIFFERENCE BETWEEN THE FACTS IN KAMAS SECURITIES CO. vs. TAYLOR, 226 P.2d 111 (Utah 1950), AND THE PRESENT CASE.

A. THE DEADLOCK ON THE BOARD OF DIRECTORS OF LLOYDONA PETERS ENTERPRISES CREATES ESSENTIALLY THE SAME PROBLEM AS IN KAMAS; THE INABILITY OF THE BOARD OF DIRECTORS TO ACT TO PRO1TECT THE CORPORATE ASSETS

The majority, in its holding, has essentially upheld the previous ruling of the Court in Kamas. However, the majority then makes a minute distinction between the facts and Kamas and the present case. That distinction being the fact that in the present case, the board of directors has met and has deadlocked on a resolution which would authorize the President of the corporation to act to protect the corporate assets in question, namely the title to one-half interest in the real prorerty in question and the right to one-half of the monthly rental on said property.

In Kamas, the president did not have sufficient time to call a meeting of the board of directors in which they could have resolved that the president file the law suit. In both cases, there is an inability of the directors to resolve and authorize the president of the corporation to take appropriate action to preserve and to protect a significant corporate asset. The distinction the majority attempts to make between the two cases appears miniscule at best. Whether that inability to produce a resolution on the part of the board of directors results from a physical impossibility due to time and distance or from a deadlock between two

opposing factions on the board, the result is the same. The corporation will suffer a irreparable loss of a significant corporate asset if the president is unable to act to preserve that asset.

The majority's holding further attempts to factually differentiate the case at hand from Kamas, by stating that Lloydona Peters Enterprises, Inc., is in no danger of losing a significant asset. As is very appropriately pointed out in the dissenting opinion in the present case, the corporation is in danger of losing a one-half undivided interest in a piece of real property located in downtown Brigham City and also a one-half undivided interest in the rental from that real property. As the dissent very appropriately points out, the loss of rents which had accrued from the time of the alleged "sale" until the Complaint was filed was $7,200.00. Those damages have continued to accrue to the present at the rate of $225.00 per month. Surely, it would seem apparent that the loss of the one half undivided interest in the title to the real property and the monthly loss of the rental from that property would be deemed a significant asset as was contimplated by the Court in deciding on Kamas.

More importantly, is the fact that if the holding in the present case stands, the Court is indicating that the president of a corporation is absolutely powerless to act to protect the assets of that corporation when the board of directors is unable to pass a resolution authorizing such

action on the part of the president. This holding ignores the reality of the fiduciary responsibility placed upon a corporate president to preserve corporate assets and to protect the rights of shareholders of the corporation. Surely, this result was not intended by the Court in Kamas, and surely, this result cannot be intended by the Court in its holding in the present case.

II. THE FACTS AS PLEAD IN PLAINTIFF'S COMPLAINT AND AS SET FORTH IN THE BRIEF AND REPLY BRIEF OF APPELLANT, CLEARLY INDICATE THAT THERE WAS NEVER A VALID SALE OF THE ONE HALF UNDIVIDED INTEREST IN THE TITLE TO THE REAL PROPERTY TO THE DEFENDANTS-RESPONDENTS.

The holding of the majority in the present case completely ignores the issue raised by Plaintiff-Appellant in its Brief and Reply Brief as to the validity of the "sale" of the corporations one half undivided interest in the tile to the real property. The previous briefs of Plaintiff-Appellant clearly set forth the manner in which the Defendants attempted to force upon the corporation their purchase of the corporations interst in the title to the real property. There was never an affirmative proposal by a member of the board of directors to accept the offer to purchase made by the Defendants. Rather, the proposal was made in the negative; i.e., it could only be vetoed by a majority of the board. It should be obvious, that this was purposely done because the two members of

the board of directors, Deloris Dorius and Gay Driggs, knew that a majority of the board would never accept the sale of the corporation's interest in the real property as the offer was made by the Defendants.

Again, the holding of the majority appears to validate the manner in which this "sale" was forced upon the corporation. In so doing, majority is holding that there need be no affirmative resolution or proposal by a board of directors. Indeed, it would appear from the holding, that there never need be a majority decision by any board of directors. As long as a proposal is framed in the negative, and that negative proposal be supported by an even number of the board of directors, but less than a majority, the action can be forced upon the board of directors and the corporation. Surely, this was not the result contemplated by the Court in its decision. Nevertheless, this is the result.

CONCLUSION

The majority holding in the present case, validates the manner in which the sale of the corporate assets was forced upon the board of directors. Further, the majority holding strips the president of a corporation of any discretionary power to act to preserve signficant assets of that corporation. When the board of directors is deadlocked as to the necessity of taking such action. For these reasons, the reasons stated in the the body of Appellant's Brief in support of its Petition for Rehearing

and the resons set forth in Appellants Brief and Reply brief, the Court should reverse its original holding in the present case and should reverse the lower Court decision granting Defendant's Motion to Dismiss and remand this case to the lower Court for a decision on the merits.

DATED this 16th day of March, 1983.

Respectfully submitted,

ROMNEY, NELSON & CASSITY

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Attorney for Plaintiff-Appellant