1971

Rocket Mining Corporation, A Utah Corporation, And Pioneer Carissa Gold Mines, Inc., A Wyoming Corporation v. Rulan J. Gill, Lenore M. Gill, Ray Gill, Angelo M. Billis, Herman F. Lund And T.W. Billis : Petition For Rehearing And Supporting Brief F Plaintiffs-Appellants

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ROCKET MINING CORPORATION, a Utah corporation, and PIONEER CARISSA GOLD MINES, INC., a Wyoming corporation,

Plaintiffs-Appellants,

vs.

RULAN J. GILL, LENORE M. GILL, RAY GILL, ANGELO M. BILLIS, HERMAN F. LUND and T. W. BILLIS,

Defendants-Respondents.

PETITION FOR REHEARING
AND
SUPPORTING BRIEF OF PLAINTIFFS-AP

APPEAL FROM THE JUDGMENT O
THIRD DISTRICT COURT FOR SALT LAKE
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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

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Case No. 12174

PETITION FOR REHEARING AND SUPPORTING BRIEF OF PLAINTIFFS-APPELLANTS

PETITION FOR REHEARING

COME NOW the Appellants above named, by and through their attorney, and pursuant to Rule 76(e)(1) of the Utah Rules of Civil Procedure, respectfully petition the Supreme Court of the State of Utah for a rehearing in the above entitled case on the following grounds:

1. Because the above entitled case was a proceeding in equity, the Court should review both the law and the facts, and a rehearing is necessary to resolve a misappre-

hension as to facts presently before the Court in this appeal and material to its decision but apparently overlooked in its consideration of the problem.

2. In its decision rendered April 8, 1971, the Court stated that although Rocket's Articles of Incorporation authorized a board of seven directors, three directors had never been elected and consequently the four directors in office would constitute the full board, and three would be a lawful quorum for the conduct of business. Thus, the Court held that the action taken by a majority of those four directors at the meeting of December 26, 1957 wherein the $130,000 was disbursed was proper because a lawful quorum was present even if one director was interested in the matter under consideration.

3. It is clear from the Record that at the annual stockholders' meeting on July 17, 1956, the stockholders of Rocket authorized a board of seven directors, elected four and left three vacancies to be filled by the directors elected. (R-298, Ex. P-2, Min. 7-17-56.)

4. The incumbent directors never filled the three vacancies.

5. On February 27, 1957, the articles of incorporation of Rocket were amended to provide for a board of seven directors. (R-298, Ex. P-7, Min. 2-27-57.)

6. At the annual stockholders' meeting on June 18, 1957, the stockholders elected six (6) directors. (R-23-24, Ex. P-2, Min. 6-18-57 on page 73 of Minute Book.) No

mention is made in the minutes of any vacancy remaining to be filled.

7. Consequently at the meeting of December 26, 1957 four directors would be required in order to form a quorum. Only four were present. If one of said directors were personally interested in the matter under consideration then there could be no lawful quorum because the three remaining directors would not be a majority of the six directors then in office as elected by the stockholders at the preceding annual meeting.

8. The applicable Utah Statute, Section 16-10-38 U. C. A. (1953) which provides the general quorum rules, when considered together with the case law rule that an interested director cannot be counted to form a quorum shows absolutely that even under the Court's rationale there could at most be three directors of an elected board of six and consequently there could be no lawful quorum present on December 26, 1957 when Appellants acted to disburse the $130,000.

9. Thus, any action to disburse the $130,000 by those three directors at the meeting of December 26, 1957 was patently unlawful.

10. This Court has twice considered the facts pertaining to the directors' meeting of December 26, 1957 and has twice rendered its written opinions concerning those facts. In its opinion of July 27, 1966, (18 Utah 2d 104, 417 P. 2d 120 (1966)) this court noted that the present respondents who had "absolute control of the corporation"

at that time, acted unlawfully "at the expense of unsuspecting and un-notified stockholders" and induced a "controlled board of directors to bail them out." In its present decision rendered April 8, 1971, this Court states on page 2 that there was an "absence of showing of fraud or chicanery of some sort." Essentially the same evidence was before the Court on both occasions as to the facts pertaining to the said directors' meeting in regard to the disbursement of the $130,000, and this Court has rendered conflicting decisions on the same. It is submitted that the Court should resolve this conflict in its decisions.

Respectfully Submitted,

WALTER P. FABER, JR.

Attorney for Appellants

ARGUMENT

POINT I.

WHERE THE STATUTE REQUIRES A MAJORITY OF THE NUMBER OF DIRECTORS AS STATED IN THE ARTICLES TO FORM A QUORUM AND SIX DIRECTORS HAD BEEN ELECTED, FOUR DIRECTORS COULD NOT CONSTITUTE A LAWFUL QUORUM IF ONE OF THE FOUR HAD A PERSONAL INTEREST IN THE MATTER BEING CONSIDERED.

The Utah statute pertaining to the number of directors

constituting a quorum is Section 16-10-38, U. C. A. (Repl. Vol. 1953), which states as follows:

> A majority of the number of directors fixed by the bylaws, or in the absence of a bylaw fixing the number of directors, then of the number stated in the articles of incorporation, shall constitute a quorum for the transaction of business unless a greater number is required by the articles of incorporation or the bylaws. The act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the bylaws.

It is undisputed that seven directors were required to constitute a full board for Rocket. It is also undisputed that six directors had been elected and that only four directors of Rocket were present at the meeting of December 26, 1957. The difficulty arises because of the nature of the action taken and the identity and interests of those four directors. At the meeting of December 26, 1957, at which the $130,000 was authorized to be disbursed, the directors present were R. J. Gill, Lenore Gill, Ray Gill and T. W. Billis. Of the $130,000, R. J. Gill was to and did receive approximately $42,000, and A. M. Billis was to and did receive approximately $35,000. Of the directors present at that meeting, R. J. Gill and Lenore Gill were husband and wife, and Ray Gill was the father of R. J. Gill. T. W. Billis was the brother of A. M. Billis.

In its decision this Court accepted the proposition that a director who has an adverse interest cannot be counted to form a quorum and cited 19 *Am. Jur.* 2*d*, Corporations,

Section 1128. The above rule of law together with the Utah statute absolutely determine the issues in favor of Appellants.

In support of its position the Court appeared to base its present opinion on a holding that there was an absence of a showing of any fraud or chicanery by plaintiffs. In that regard it is pertinent to compare the Court's prior decision in 1966, 18 Utah 2d 104, 417 P. 2d 120 (1956) with its present opinion and note certain facts which the Court apparently overlooked in making its current decision. On the question of "fraud or chicanery" it seems without doubt that the 1966 opinion rendered by this Court is more consistent with the evidence presented than the present decision. Certainly, the very fact that defendants sold their entire majority interest in a public corporation for apparently less than $6,000 (R-571) when the corporation supposedly had a net value above liabilities of approximately $500,000 (Ex. P-11) is at least some indication of improper dealing. Moreover, the defendant R. J. Gill did not know the amount he sold his stock for, had no records and did not call a corporate meeting to authorize the transfer of defendants' controlling interest in Rocket. (See R-393-94, 571.)

The present decision implies that there would be a question about the applicability of the statute of limitations if the case had not been resolved on the merits by the trial court. This inference creates another conflict with the 1966 decision. The question about the statute of limitations was necessarily resolved by this Court's 1966 decision, otherwise the 1966 decision would have to have been re-

solved in favor of defendants because the illegal salaries were approved at an even earlier meeting than the meeting of December 26, 1957, and the present action included when it was filed both the question of the illegal salaries and the unlawful disbursement of the $130,000.

In addition, the Court concluded its most recent opinion by stating that the actions about which plaintiffs complain occurred prior to the time plaintiffs obtained an interest in the corporation. This seems to imply that even if there were wrong doing it was none of plaintiffs' affair. However, plaintiffs did have an interest as is shown by the evidence presented to the Court. Plaintiff Pioneer Carissa's contract to sell its assets to Rocket took place in December, 1956. (R-298, Min. 11-7-56.) Pioneer at that time became a shareholder of Rocket. Rocket never fulfilled its contract to Pioneer after it took over Pioneer's assets in 1956 and Pioneer obtained a judgment against Rocket in the federal court in 1960. (R-298, Ex. D-29, R-420.)

It is interesting to note that the so-called "interest free loans" the Court refers to apparently provided defendants with illegal salaries because Rocket's operations were never on a paying basis. (See 1966 decision.) Moreover, as to each of the original issues presented to the Court, it is apparent from the evidence that defendants manipulated the corporation to their own ends. It is submitted that when the issues and evidence are considered together the Court's 1966 opinion as to the evidence is more applicable than the present decision.

CONCLUSION

It is submitted that when all of the evidence is reviewed as a whole and the present plaintiffs' interest as a shareholder on December 26, 1957 is acknowledged the "fraud and chicanery" against plaintiffs is apparent. Notwithstanding any fraud or breach of fiduciary duty, however, it appears as a matter of law plaintiffs are entitled to judgment for the $130,000 because there was no lawful quorum present when the same was disbursed. In addition, when the apparent fraud and the fact there was no lawful quorum are considered together and in conjunction with a controlled board of directors the plaintiffs are clearly entitled to judgment.

Respectfully submitted,

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WALTER P. FABER, JR.

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing brief on David K. Watkiss, Attorney for Respondents at 400 El Paso Gas Building, 315 East 2nd South, Salt Lake City, Utah postage prepaid, this 12th day of May, 1971.