VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, **Plaintiff,** **v.** **ACKERMAN MCQUEEN, INC.** **And** **MERCURY GROUP, INC.** **Defendants.**	**Case Nos. CL19001757, CL19002067**

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' PLEAS IN BAR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Plaintiff National Rifle Association of America (the "NRA") submits this Memorandum of Law in Opposition to the Pleas in Bar filed by Defendants Ackerman McQueen, Inc. ("AMc") and Mercury Group, Inc. ("Mercury" and together with AMc, the "Defendants"), in the consolidated proceedings captioned above and docketed under Case Nos. CL19001757 and CL19002067 (together, the "Actions"). Defendants' Pleas in Bar concern whether Mr. Wayne LaPierre, the Executive Vice President ("EVP") and Chief Executive Officer ("CEO") of the NRA, possessed the authority to authorize the filing of the Actions against the Defendants. In light of well-settled principles of New York law, which govern the internal management of the NRA, and the clear and unambiguous language in the NRA's Bylaws, Defendants' Pleas in Bar are devoid of merit and must be rejected.[1]

I.

INTRODUCTION

Defendants AMc and Mercury Group seek a premature and unwarranted exit from this consolidated proceeding. To that end, they filed nearly identical Pleas In Bar in the two Actions, erroneously contending that the Actions were legally defective and subject to dismissal because Wayne LaPierre, the Executive Vice President ("EVP") and Chief Executive Officer ("CEO") of the NRA, who manages the organization's affairs, did not have the power to authorize the filing of the Actions. Defendants' Pleas In Bar are devoid of legal or factual merit and should be dismissed for the following reasons.

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[1] AMc also refers to two other lawsuits the NRA has filed against AMc, including a lawsuit pending in the United States District Court for the Northern District of Texas, Dallas Division. Of course, this Court has no jurisdiction over the action pending in federal court in Dallas, Texas. The fourth action was brought in this Court, but AMc has not filed a Plea In Bar, much less entered an appearance, in that case.

Defendants' Pleas In Bar are precluded as a matter of law by binding precedent from the New York Court of Appeals, the highest court in New York.[2] It is not disputed that the NRA is a not-for-profit corporation organized under the laws of New York,[3] and that jurisdiction's law governs whether Mr. LaPierre, the EVP and CEO of the NRA, had the power to authorize filing the Actions.[4] The law is clear that a senior officer of a corporate entity who manages the organization's affairs inherently possesses the power to authorize the filing of the litigation. *See West View Hills, Inc. v. Lizau Realty Corp.*, 160 N.E.2d 622, 624 (N.Y. 1959) (president of company possessed authority to authorize filing of lawsuit); *Rothman & Schneider, Inc. v. Beckerman*, 41 N.E.2d 610, 613 (N.Y. 1957) (secretary-treasurer had authority to authorize filing of lawsuit where he managed affairs of corporation). Accordingly, based on well-settled precedent of the New York Court of Appeals, Mr. LaPierre without doubt had the power to authorize the filing of the Actions. In addition, AMc does not have standing to challenge the filing of the Actions, because the New York Court of Appeals has long held that "strangers" to the corporation, such as the Defendants, lack the ability to challenge whether a decision to initiate litigation was duly authorized. *See Rothman & Schneider*, 141 N.E.2d at 614.

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[2] *See London Terrace Towers, Inc. v. Davis*, 790 N.Y.S.2d 813, 823 (Civ. Ct. 2004) (stating that the New York Court of Appeals is the highest court in New York State).

[3] *See* Defendants' Answer, Plea In Bar, and Counterclaim, filed on May 23, 2019 in *National Rifle Association of America v. Ackerman McQueen, Inc., et al.*, Case No. CL19001757 (the "First Action"), at § B, Answer to ¶ 1, p. 4; Defendants' Responsive Pleadings: Answer, Affirmative Defenses, Plea In Bar, Demurrer, and Counterclaim, filed on June 19, 2019 in *National Rifle Association of America v. Ackerman McQueen, Inc., et al.*, Case No. CL19002067 (the "Second Action"), at Answer to ¶ 1, p. 2.

[4] AMc has conceded in its Pleas In Bar that the applicable law is the law of the state of New York. *See* Defendants' Plea in Bar in the First Action at ¶ 4, p. 24; Defendants' Plea In Bar in the Second Action at ¶ 3, p. 16.

Defendants' Pleas In Bar likewise fail as a factual matter. The NRA Bylaws are broad and vest in Mr. LaPierre the capacity as EVP and CEO to authorize the filing of the Actions. The NRA's Bylaws likewise do not expressly prohibit the EVP and CEO from exercising his power to commence a lawsuit. *See* Exhibit A, "NRA Bylaws, as amended April 29, 2017," to Declaration of Wayne LaPierre ("LaPierre Dec.") (attached at Ex. 1). In fact, the NRA's Bylaws specifically provide for broad authority and powers to the EVP, stating that the EVP "shall direct *all* the affairs of the Association in accordance with the programs and policies established by the Board of Directors." *See id.* at Art. IV, § 2 (emphasis added). The initiation of the Actions is clearly within the power of the duly appointed EVP and CEO of the NRA, who is responsible for managing the organization's business. The fact the Bylaws impose certain restrictions on the Executive Committee of the Board of Director's rights to undertake corporate acts of "major significance" is irrelevant because Mr. LaPierre authorized the filing of the Actions in his capacity as EVP and CEO pursuant to the NRA Bylaws and his inherent authority pursuant to New York law. Moreover, AMc's resort to reliance on gossip and inadmissible hearsay to save their legally and factually deficient claims is unavailing.

Finally, the decisions relied on by AMc are all inapposite. None of the case it relies on offers aid to its flawed theory, and in any event, they are decisions from lower courts, not from the New York Court of Appeals. For all these reasons, the NRA respectfully requests that Defendants' Pleas In Bar be denied and dismissed with prejudice.

II.

APPLICABLE LEGAL STANDARDS

"A plea in bar presents a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery." *Hilton v. Martin*, 654 S.E.2d 572, 574 (Va. 2008). AMc has the burden of proof on its pleas. *Cooper Indus., Inc. v. Melendez*, 537 S.E.2d 580, 590 (Va. 2000).

The moving party and its party-opponent may introduce evidence in support or in opposition of the plea. *See Hawthorne v. VanMarter*, 692 S.E.2d 226, 230 (Va. 2010); *Upper Occoquan Sewage Auth. V. Blake Constr. Co.*, 587 S.E.2d 721, 722-23 (Va. 2003).

III.

FACTUAL BACKGROUND

Defendants acknowledge the NRA is a not-for-profit corporation organized under the laws of New York. *See* Defendants' Answer, Plea In Bar, and Counterclaim, filed in the First Action, at § B, Answer to ¶ 1, p. 4; Defendants' Responsive Pleadings: Answer, Affirmative Defenses, Plea In Bar, Demurrer, and Counterclaim, filed in the Second Action, at Answer to ¶ 1, p. 2. Mr. LaPierre is the EVP and CEO of the NRA. *See* Ex. 1, LaPierre Dec. at ¶ 4. Mr. LaPierre states that he authorized the filing of the Actions. *See id.* at ¶¶ 9-11. He further states that in those roles he is responsible for the management of the NRA's operations and business affairs. *See id.* at ¶¶ 4-6.

The duties and powers of the NRA EVP are expressly set forth in Section (2)(c) of Article IV of the NRA Bylaws. *See* Exhibit A to LaPierre Dec. at Art. IV, § 2(c) (NRA Bylaws). In relevant part, that provisions states, "The Executive Vice President shall direct all the affairs of the Association in accordance with the programs and policies set by the Board of Directors." *See id.*

The Corporate Secretary and General Counsel of the NRA likewise states that during his tenure with the organization, it has not been the practice of the NRA management to seek a Board vote, or other Board authorization or approval, in advance of commencing litigation. Declaration of John Frazer ("Frazer Dec.") at ¶¶ 2-3 (attached at Ex. 2). According to Mr. Frazer, "Since 2018 alone, several high-profile lawsuits were filed, prior to the above-captioned litigations, which were authorized solely by NRA management and not by the Board. After these lawsuits were filed, the

Board received detailed briefings about their commencement and progress. The Board has also received detailed briefing about the above-captioned cases." *Id.* at ¶ 5.

Defendants are not directors, officers, or members of the Board of Directors of the NRA. Ex. 1, LaPierre Decl. ¶ 7. There are seventy-five members of the NRA Board of Directors. *See* Exhibit A to LaPierre Dec. at Art. IV, § 1 (NRA Bylaws).[5]

IV.

ARGUMENTS AND AUTHORITIES

As stated above, Wayne LaPierre is the EVP and CEO of the NRA. *See* LaPierre Dec. at ¶¶ 4-6. AMc alleges that Mr. LaPierre authorized the filing of the Actions without obtaining prior approval from the NRA Board of Directors. *See* Defendants' Plea In Bar in the First Action at ¶ 3, p. 24; Defendants' Plea In Bar in the Second Action at ¶ 2, p. 16. Their contention rests on the novel and erroneous claim that "New York law governing nonprofit organizations requires that an organization's board must authorize any corporate action." *See* Defendants' Plea In Bar in the First Action at ¶ 4, p. 24; Defendants' Plea In Bar in the Second Action at ¶ 3, p. 16. Their claims should be rejected for the legal and factual defects described below.

A. AMc's Pleas In Bar Are Barred As A Matter of Law By Established Precedent From The New York Courts Of Appeals For Multiple Reasons.

1. Under New York law, corporate officers have broad authority to authorize the filing of lawsuits on the corporation's behalf.

AMc's position that the board of a corporation "must authorize *any* corporate action," is based on a misreading of New York law. *See* Defendants' Plea In Bar in the First Action at ¶ 4, p. 24; Defendants' Plea In Bar in the Second Action at ¶ 3, p. 16. If AMc's novel theory were

[5] The NRA has subsequently amended its Bylaws in ways not relevant to this dispute.

adopted, it would invalidate nearly every act undertaken by the officers of every New York corporation. That, of course, is not the law.

Ultimately, AMc's contention that "no individual director or officer, acting alone" could legally authorize the filing of a lawsuit on behalf of a corporation has no support in the New York Not-for-Profit Corporation law. *See* Defendants' Plea In Bar in the First Action at ¶ 5, p. 24; Defendants' Plea In Bar in the Second Action at ¶ 4, p. 16. Indeed, New York law does not require that the board of directors must authorize the filing of a lawsuit, or that a corporate officer is prohibited from doing so without prior approval from the board of directors. *See* N.Y. Not-for-Profit Corp. Law § 101, *et seq*. Literally no statutory provision in the relevant chapter of New York's statutory code remotely supports AMc's position. And, consistent with the above, AMc does not cite to any such provision either.

Setting aside the absence of statutory support for its theory, AMc ignores binding precedent from the New York Court of Appeals. In *West View Hills, Inc. v. Lizau Realty Corp.*, 160 N.E.2d 622 (N.Y. 1959), the New York Court of Appeals held that the president of a corporation was deemed to have the inherent authority to initiate a lawsuit on behalf of the corporation. *Id.* at 624. The Court reasoned:

> Absent a provision in the by-laws of action by the board of directors prohibiting the president from defending and instituting suit in the name of and in behalf of the corporation, he must be deemed, in the discharge of his duties, to have presumptive authority to so act.

Id. The New York Court of Appeals has re-confirmed this precise holding in *Fischer v. Maloney*, 373 N.E.2d 1215, 1216 (N.Y. 1978) (holding that corporate president held authority to authorize lawsuit, even though it arguably failed to comply literally with the bylaws requiring notice of meeting at which lawsuit would be discussed). Reflecting these seminal authorities, the law is clear that absent an explicit prohibition by the corporation's board or its bylaws, a senior officer's

implied authority to protect and preserve the interests of the corporation entitles him or her to commence litigation in the corporation's name. *See, e.g., TJI Realty, Inc. v. Harris*, 250 A.D.2d 596, 597-98 (2d Dep't 1998) ("Absent a provision in the by-laws or action by the board of directors prohibiting the president from . . . instituting suit in the name and in behalf of the corporation, he must be deemed, in the discharge of his duties, to have presumptive authority to act.") (quotation and citation omitted); *Happy Banana, Ltd. v. Tishman Constr. Corp.*, 578 N.Y.S.2d 574 (App. Div. 1992) (Where the business affairs of a corporation are conducted by the corporate "secretary" rather than the office of the "president," "there is no reason why [the secretary] should not be able to institute an action on the corporation's behalf."); *accord Rothman & Schneider,* 141 N.E.2d 610, 613 (N.Y. 1957) (A "secretary-treasurer" had implied authority to authorize suit on behalf of a corporation, notwithstanding that "[t]he by-laws gave him no such power, and the board of directors, not requested to pass upon the matter, took no action.").[6]

The undisputed facts are that Mr. LaPierre is a senior officer of the NRA with the responsibilities of Executive Vice President and Chief Executive Officer. Ex. 1, LaPierre Dec. ¶¶ 4-6. In those capacities, Mr. LaPierre is charged with and performs the duties and responsibilities

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[6] For purposes of determining whether a senior office has the presumptive ability to authorize suit, the authority to act for a corporation arises not from an officer's formal title but from the substantive powers and duties the corporation confers upon the officer. *See Cicero Indus. Dev. Corp. v. Roberts*, 312 N.Y.S.2d 893 (Sup. Ct. 1970) ("If the president is the general manager of the corporation, there is little doubt that he has broad powers to sue under orthodox agency rules."); 9 Fletcher Cyc. Corp. § 4216 ("The power to sue or defend an action [...] may be vested in the president or other managing officer of the corporation."); *Paloma Frocks, Inc. v. Shamokin Sportswear Corp.*, 147 N.E.2d 779, 781 (1958) ("Where there has been no direct prohibition by the board the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation); *Berma Mgmt. Corp. v. 140 W. 42nd St. Realty, Inc.*, 197 N.Y.S.2d 18 (Sup. Ct. 1960) (similar); *Joseph Polchinski Co. v. Cemetery Floral Co., Inc.*, 79 A.D.2d 648 (2d Dep't 1980) (similar); *Family M. Found. Ltd. v. Manus*, 71 A.D.3d 598, 599, (N.Y. 1st Dept. 2010) (similar); *Fernandez v. Hencke*, 93 A.D.3d 440 (1st Dep't 2012) (similar).

of managing the operations and affairs of the NRA. *Id.* Mr. LaPierre is plainly and presumptively empowered to authorize the filing of the Actions, as a matter of New York law. This conclusion is underscored by the fact that it has been the historical practice of NRA management not to seek a Board vote or other authorization in advance of litigation and instead to provide the Board detailed briefings about the above-captioned litigation and other high-profile legal matters. Ex. 2, Frazer Decl. ¶ 5. For this reason alone, the NRA respectfully requests that this Court deny Defendants' Pleas In Bar.

2. Under New York law, complete strangers to a corporation, such as Defendants, cannot challenge a corporate officer's authority to authorize commencement of litigation.

Defendants lack standing to challenge the authority of Mr. LaPierre to authorize the filing of the Actions, because under New York law, only a "stockholder, officer, or director of a plaintiff corporation has standing to challenge that corporation's capacity to sue." *Hillcrest Paper Co. v. Ohlstein,* 172 N.Y.S.2d 827, 828 (Sup.1958), *aff'd,* 6 A.D.2d 864, 175 N.Y.S.2d 1021 (App. 1959) (strangers to the corporation are not permitted to question an officer's authority to institute suit); *accord Farmers Union Oil Co. v. Maixner,* 376 N.W.2d 43, 46 (N.D.1985) ("[I]f a corporation does not object to an officer's lack of authority, a third person may not object.").[7]

In *Rothman & Schneider, Inc. v. Beckerman,* for example, the secretary-treasurer of a corporation authorized the filing of a lawsuit against a former vendor, claiming that the vendor illegally converted a portion of the corporation's assets. 141 N.E.2d 610, 611-12 (N.Y. 1957).

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[7] While the NRA has been challenged by Defendants over Mr. LaPierre's right to authorize the Actions, the Board of Directors has not objected to the Actions based on Mr. LaPierre's purported lack of authority to authorize them. Indeed, the Board has effectively ratified Mr. LaPierre's decision, further vitiating Defendants' claims. *Cf. Village of Brown Deer v. City of Milwaukee,* 114 N.W.2d 493, 497 (1962) ("[I]f a corporation does not raise the objection that an officer lacked authority to do an act on behalf of the corporation, such objection may not be raised by a third person.").

The defendant vendor defended the action on the basis that, without approval from the corporation's board of directors, the secretary-treasurer authorized the filing of the suit. *Id.* at 612. The Court of Appeals of New York disagreed with the defendant-vendor and reversed, reasoning that the secretary-treasurer possessed the power to initiate the action because he was the one "actually managing its business." *Id.* at 613. In reaching this conclusion, the Court of Appeals found that defendants were "complete strangers to the corporation" and therefore should not be afforded standing to "question [secretary-treasurer's] authority and [to] frustrate the action." *Id.* at 614.

Neither Defendant is a director, officer, or member of the NRA Board of Directors. Ex. 1, LaPierre Decl. at ¶ 7. As the New York Court of Appeals and other courts have uniformly held, absent falling within one of those categories, a defendant adverse to a corporation in litigation has no standing to challenge whether the plaintiff's suit was duly authorized. *See e.g., Rothman & Schneider*, 141 N.E.2d at 614 (N.Y. 1957); *Hillcrest Paper Co.*, 172 N.Y.S.2d at 828 (Sup. 1958). Defendants have not presented admissible evidence that the NRA Board of Directors has sought to challenge the initiation of the Actions, much less questioned Mr. LaPierre's decision. Accordingly, the NRA respectfully requests that this Court dismiss Defendants' Pleas in Bar on this separate and independent basis alone.

B. The Evidence Submitted By The Parties Demonstrates That Mr. LaPierre In Fact Acted Within His Powers In Authorizing Filing The Actions

1. The NRA's Bylaws confer broad authority upon its Executive Vice President, to authorize the filing of a lawsuit.

The NRA Bylaws do *not* provide that the NRA Board of Directors or a subdivision thereof is required to approve every corporate act. *See* Exhibit A to LaPierre Dec. (NRA Bylaws). Nor do the Bylaws state that only the Board or a subdivision thereof may authorize the filing of a lawsuit. *See id.* Rather, the Bylaws state that the Board's duties are to formulate NRA policy and

exercise general oversight over the NRA's activities, *see id.* at Art. 5, § 2(c), and that "[t]he Executive Vice President shall direct *all the affairs of the Association* in accordance with the programs and policies established by the Board of Directors," *id.* (emphasis added).

The broad nature of the explicit authority conferred upon Mr. LaPierre as EVP and CEO in the management of the NRA through the Bylaws necessarily extends to the initiation of lawsuits. Tellingly, AMc points to no provision of the Bylaws that expressly prohibits Mr. LaPierre from authorizing the filing of the Actions on behalf of the NRA or explicitly vest that power elsewhere. Confirming that the Bylaws grant Mr. LaPierre the power to authorize suit, in practice the Board does not vote on or authorize the filing of litigation, but rather receives detailed briefings about the status of high-profile litigation matters, such as the cases at bar. Ex. 2, Frazer Decl. ¶¶ 3-5.

Defendants' entire argument rests on a provision that has no application here. Article VI of the NRA Bylaws allows the "Executive Committee" to "exercise all the powers of the Board of Directors when said Board is not in session," excepting certain powers enumerated in Section 2(a) of Article VI, including the powers to "[f]ormulate such other corporate policy decisions or perform corporate activities of the Association of such major significance as to warrant action by the full Board of Directors." Exhibit A to LaPierre Dec. at Article VI, § 2(k) (NRA Bylaws). AMc therefore incorrectly relied on a limitation to the specific powers of the Executive Committee, rather than the provision in fact operative here, namely the vesting of broad powers in the EVP. *Id.* For this reason alone, Defendants' theory should be rejected.

2. <u>In the absence of admissible evidence, Defendants point to gossip, newspaper reports, and other inadmissible hearsay, yet cannot save their claims.</u>

In order to salvage its legally and factually defective claim, Defendants resort to unsupported and conclusory allegation that Mr. LaPierre has personal and pecuniary conflicts of interest that would bar him from authorizing the filing of the Actions. These conclusory allegations

have no basis in fact and amount to nothing more than inadmissible hearsay. In fact, the United States Court of Appeals for the Fourth Circuit has consistently held that newspaper articles are inadmissible hearsay if they are used "to prove the factual matters asserted therein." *Gantt v. Whitaker*, 57 F. App'x 141, 150 (4th Cir. 2003) (citing *United States v. ReBrook,* 58 F.3d 961, 967 (4th Cir.1995)).

Instead of offering admissible evidence, AMc provides nothing more than unsourced rumors and statements tantamount to libel. Neither a "report in the national news" nor "[an]other persons[']speculation," much less the absence of an affirmative statement constitute admissible evidence. Rumors, innuendo, personal opinions, and thinly veiled insults are indeed inadmissible whether hearsay or otherwise.[8]

AMc also cites "an article that the Wall Street Journal reported yesterday" for the proposition that the NRA Board of Directors "thought it was necessary" to undertake specific corporate acts. AMc asserts that if the Board of Directors "addresses issues as small as a $5,500 payment to the son of an NRA official" and as large as the "multi-million contract for former NRA President Oliver North," then the Board must surely approve this "much more significant" litigation. *See* Defendants' Memo. of Law In Support of Plea in Bars at p. 4.

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[8] Defendants' also cite to *People by Attorney Gen. of State v. Lutheran Care Network, Inc.*, 167 A.D.3d 1281 (N.Y. App. Div. 2018), for the proposition that the "business judgment rule" does not apply where corporate officers take actions that exceed their authority and are affected by a conflict of interest. This case is inapplicable because, as explained above, Mr. LaPierre is indeed authorized to approve the filing of lawsuits. *See supra* § IV.A.2. Nor do Defendants provide any factual basis to support their conclusory allegation that Mr. LaPierre has conflicts of interest that would prohibit him from initiating the Actions. Nor would Defendants have standing to challenge whether these unidentified conflicts disqualified Mr. LaPierre from authorizing suit, as they remain strangers to the corporation. *See supra* § IV.A.2.

Even if this concoction was not premised entirely on inadmissible hearsay (which it is), it ultimately provides no support for AMc's theory that the NRA Board of Directors had to approve the filing of the Actions. The relevant corporate documents, however, vest that very power in the position of EVP. *See* Exhibit A to LaPierre Dec. at Art. IV, § 2(c) (NRA Bylaws). AMc's theory also runs directly counter to the long-standing presumption under New York law that the individual who manages the affairs of the organization has the authority to authorize the filing of a lawsuit. *See Rothman & Schneider, Inc. v. Beckerman*, 141 N.E.2d 610, 613 (N.Y. 1957) (holding that secretary-treasurer possessed the ability to authorize the lawsuit because he was the one "actually managing [the company's] business"); *Fischer v. Maloney*, 373 N.E.2d 1215, 1216 (N.Y. 1978) (corporate president who managed the corporation possessed the authority to approve filing lawsuit, even though he arguably failed to comply with the bylaws requiring notice of board meeting at which the potential lawsuit was on the agenda). For these reasons too, the Court should dismiss the Pleas In Bar with prejudice.

V.

CONCLUSION

For all the foregoing reasons, Plaintiff NRA respectfully requests this Court deny Defendants' Pleas In Bars and grant the NRA such other and further relief, including attorney fees and costs, as justice may require or allow.

Dated: October 1, 2019

Respectfully submitted,

PLAINTIFF NATIONAL RIFLE ASSOCIATION OF AMERICA

By counsel

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2019, I caused the foregoing to be served via electronic mail and first-class mail upon:

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EXHIBIT 1

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, **Plaintiff,** **v.** **ACKERMAN MCQUEEN, INC.,** **And** **MERCURY GROUP, INC.** **Defendants.**	**Case Nos. CL19001757** **CL19002067**

DECLARATION OF WAYNE LAPIERRE

1. My name is Wayne LaPierre.

2. I am over the age of twenty-one years and am fully competent and able to testify as to the facts and statements contained herein, and am able to swear, and do hereby swear, that all of the facts and statements contained herein are true and correct to the best of my knowledge and that, except as expressly noted otherwise, I have personal knowledge of the same.

A. General Background

3. At all relevant times concerning the above-captioned proceedings, I have served as the Executive Vice President ("EVP") and Chief Executive Officer ("CEO") of the plaintiff, the National Rifle Association of America (the "NRA").

4. I understand that pursuant to the NRA Bylaws, my role as EVP of the NRA includes directing all of the affairs of the NRA in accordance with the programs and policies established by

the Board of Directors. I have attached a true and correct version of the NRA Bylaws in effect at the time that the NRA filed the above Actions.

5. In my role as CEO, I am the highest-ranking executive of the NRA and my duties and responsibilities effectively include responsibility for managing the organization's affairs, including making major corporate decisions and managing overall operations and resources.

6. Neither Defendant in the Actions, Ackerman McQueen, Inc. and Mercury Group, Inc. (collectively, "AMc" or "Defendants") are directors, officers, or members of the Board of Directors of the NRA or any subdivision thereof.

B. <u>As Executive Vice President and CEO of the Plaintiff NRA, I legally initiated the lawsuits against Defendants.</u>

7. On or around April 12, 2018 and in my capacity as EVP and CEO of the NRA, I authorized outside counsel to initiate a lawsuit against Defendants seeking, *inter alia*, the court to order Defendants to produce documents relating to their work for the NRA for inspection by the NRA. I understand this case is captioned *National Rifle Association of America v. Ackerman McQueen, Inc., et al.*, Case No. CL19001757 (the "First Action").

8. On or around May 22, 2018 and in my capacity as EVP and CEO of the NRA, I authorized outside counsel to initiate a lawsuit against Defendants, seeking relief attributable to AMc's additional breaches of contract and breach of fiduciary duty. I understand case is captioned *National Rifle Association of America v. Ackerman McQueen, Inc., et al.*, Case No. CL19002067 (the "Second Action").

9. As previously stated, I authorized outside counsel for the NRA to initiate the First and Second Actions in my capacity as EVP and CEO of the NRA.

10. I declare under penalty of perjury that the foregoing is true and correct.

Commonwealth of Virginia
City/County of Fairfax

This instrument was acknowledged before me on 1st day of Oct, 2019 by Wayne LaPierre

[redacted]
Notary Public's Signature

[redacted]
WAYNE LAPIERRE

LISA L. SUPERNAUGH
NOTARY PUBLIC
REGISTRATION # 304034
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES
4/30/2021

Exhibit A

The NATIONAL RIFLE ASSOCIATION OF AMERICA

BYLAWS

AS AMENDED

SEPTEMBER 10, 2016

APRIL 29, 2017

A NEW YORK STATE MEMBERSHIP
CORPORATION CHARTERED IN 1871

The National Rifle Association of America

The National Rifle Association, chartered in 1871, is not only the oldest sportsmen's organization in America, but also is an educational, recreational and public service organization dedicated to the right of the individual citizen to own and use firearms for recreation and defense.

The NRA is a nonprofit corporation supported by membership dues and contributions from public spirited members and clubs. It is not affiliated with any arms or ammunition manufacturer nor with any business which deals in guns or ammunition. It receives no appropriations from Congress.

The NRA cooperates with all branches of the United States Armed Forces, federal agencies, state and local governments interested in teaching small arms marksmanship and firearm safety to the maximum number of Americans.

During World War II, NRA members taught over one million seven hundred thousand Americans the correct use of small arms in preinduction training courses.

Past presidents of the Association include: U.S. President Ulysses S. Grant and General Philip H. Sheridan. Among the many notables who have been members of the National Rifle Association are eight Presidents of the United States, two Vice Presidents of the United States, two Chief Justices of the U.S. Supreme Court and numerous U.S. Congressmen, as well as legislators and officials of the several state governments.

(This supersedes the printed copy of the Bylaws as amended May 23, 2016).

NOTE: AMENDMENTS IN BOLD FACE ITALICS SHALL NOT BE REPEALED OR AMENDED BY THE BOARD OF DIRECTORS.

TABLE OF CONTENTS

Bylaws

ARTICLE I

Name

The name of this organization is the National Rifle Association of America.

ARTICLE II

Purposes And Objectives

The purposes and objectives of the National Rifle Association of America are:

1. To protect and defend the Constitution of the United States, especially with reference to the God-given inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, collect, exhibit, transport, carry, transfer ownership of, and enjoy the right to use, keep and bear arms, in order that the people may exercise their individual rights of self-preservation and defense of family, person, and property, and to serve in the militia of all law-abiding men and women for the defense of the Republic and the individual liberty of the citizens of our communities, our states and our great nation;

2. To promote public safety, law and order, and the national defense;

3. To train members of law enforcement agencies, the armed forces, the National Guard, the militia, and people of good repute in marksmanship and in the safe handling and efficient use of small arms;

4. To foster, promote and support the shooting sports, including the advancement of amateur and junior competitions in marksmanship at the local, state, regional, national, international, and Olympic levels;

5. To promote hunter safety, and to promote and defend hunting as a shooting sport, for subsistence, and as a viable and necessary method of fostering the propagation, growth and conservation, and wise use of our renewable wildlife resources.

The Association may take all actions necessary and proper in the furtherance of these purposes and objectives.

ARTICLE III

Membership

Section 1. Eligibility.

(a) Any citizen of the United States who is and while he remains of good repute, who subscribes to the objectives and purposes of the Association, or any organization as hereinafter described, shall be eligible to be a member of the Association, provided that citizens of foreign nations and organizations composed in whole or in major part of citizens of foreign nations may be admitted to membership as provided in Sections 3 and 4 of this Article.

(b) No individual who is a member of, and no organization composed in whole or in part of individuals who are members of, any organization or group having as its purpose or one of its purposes the overthrow by force and violence of the Government of the United States or any of its political subdivisions shall be eligible for membership.

Section 2. Dues and Contributions.

The dues or minimum contributions of each class of membership shall be fixed by the Board of Directors. Except for those persons who are lifetime members elected prior to July 1, 1979, all members of all classes with addresses not within the domestic United States may be required to pay the additional postage costs necessary for Association mailings to their stated addresses. The imposition of such requirement and the amount of such costs shall be determined administratively from time to time.

Section 3. Individual Members.

(a) **Individual Members.** Individual members shall be Benefactor, Patron, Endowment, Life, Annual, and such other members as are designated in this section.

(b) **Honorary Life Member.** A person may be nominated for Honorary Life membership by the Executive Council and be elected to such

membership by the Board of Directors in recognition of outstanding service to the Association on a national scale in any one or more of the primary fields of endeavor of the National Rifle Association of America. Not more than three individuals shall be elected as Honorary Life Members in any one calendar year. Honorary Life Members shall enjoy all the rights and privileges of Life Members.

(c) **Lifetime Members.** Benefactor, Patron, Endowment, and Life Members are members for life.

(d) **Associate Member.** A person who elects to pay reduced dues may become an Associate member on an annual basis upon payment of such dues as may be determined by the Board of Directors.

(e) **Junior Member.** A person 20 years of age or under, who pays such dues as may be determined by the Board of Directors, may become a junior member. Such status shall continue through the end of the calendar year in which his or her 20th birthday occurs.

(f) **Non-Citizen Member.** A citizen of a nation other than the United States, whether resident within or without the United States, who is interested in the pursuit of the purposes and objectives of the Association may become a member of the Association in any of the classes listed in this Section, subject to the limitation of Section 6(e) of this Article, upon the fulfillment of any condition for membership within said class. Non-citizen memberships shall be subject to termination or suspension by vote of the Board of Directors, or the Executive Committee, if the Board is not in session, whenever, by proclamation of the President of the United States, or by action of the Congress, the nation of which any such member is a citizen is in a state of war or active military hostilities with the United States, and good cause exists for such termination or suspension.

(g) **Membership Categories.** The Board of Directors may establish Membership Categories for individual members of various Membership Classes. Membership shall be in accordance

with administrative requirements and procedures approved by the Executive Vice President. The Board may provide for reduced or augmented dues for members belonging to such categories.

(h) **Upgrading Class of Membership.** An individual member of one class may become a member of a different class, if qualified therefor, by contributing the minimum dues or contribution specified by the Board of Directors for the class of membership desired, less the contribution specified for his current membership.

Section 4. Affiliated or Participating Organizations.

(a) **Affiliated Organizations.**

The following affiliated organizations are organization members:

(1) **State Association.** An organization in a single state or territory that promotes and supports the purposes and objectives, policies and programs of the National Rifle Association. Membership shall be composed primarily of individuals, clubs and other organizations of that state or territory. Affiliation as the official State Association shall be by approval of the Board of Directors of the National Rifle Association, and not more than one organization may be so affiliated to represent any state or territory.

(2) **Approved Organization.** An organization other than a local club, composed primarily of individuals and/or clubs from a single state or territory, formed to promote one or more of the purposes and objectives of the National Rifle Association in the state or territory for which it is organized. Affiliation shall be in accordance with administrative requirements and procedures approved by the Executive Vice President.

An organization whose purposes and/or programs conflict with those of an existing affiliate in a state or territory shall not be affiliated.

(3) **Club.** A local organization composed of not less than five citizens of the United States, whose purposes are consistent with those of the National Rifle Association. Affiliation shall be

in accordance with administrative requirements and procedures approved by the Executive Vice President.

(b) **Non-Citizen Organizations.**

An organization of five or more members, wherever located, composed in whole or in major part of citizens of countries other than the United States, the purposes of which are consistent with those of the National Rifle Association. Enrollment shall be in accordance with administrative requirements and procedures approved by the Executive Vice President. Such organization membership shall be subject to termination or suspension in the same manner as provided in Section 3(f) of this article.

(c) **Participation By Other Organizations.**

A nonprofit organization, including a national, regional, or state membership organization, educational institution, summer camp, or law enforcement organization, the purposes of which are not inconsistent with those of the National Rifle Association, may affiliate with the NRA or participate in programs of the NRA, in accordance with administrative requirements and procedures approved by the Executive Vice President.

A commercial organization or enterprise, including a private security agency, the purposes of which are not inconsistent with those of the National Rifle Association, may participate in specific programs of the NRA, in accordance with administrative requirements and procedures approved by the Executive Vice President.

Section 5. Admission to Membership.

(a) An appropriate card, certificate or insignia shall be issued to each member as evidence of membership.

(b) Any applicant for any class of membership or affiliation may be refused admission or affiliation by the Board of Directors for any reason deemed by it to be sufficient.

Section 6. Rights and Privileges of Members.

(a) All members who comply with the regulations and meet the conditions specified for any particular match shall have the privilege of competing in such match whether conducted by the Association or its affiliated organizations and of qualifying for such awards as may be established by the Association.

(b) All members shall have the privilege of requesting and receiving from the Association such advice and assistance as may be currently available concerning small arms, ammunition and accessories, range construction, and organization and management of clubs and competitions. A reasonable charge may be made by the Association for such assistance.

(c) Except as provided in this subsection, all individual members of the Association shall be entitled to a subscription to the official journal as a privilege of membership. The Board of Directors may determine reduced dues or contributions for Associate, Junior or undesignated Family members of the Association, on the condition that such members electing to pay reduced dues or contributions shall not be entitled to a subscription to the official journal. Except as provided in Article IV, Section 1(a)(2), no Associate member, Junior member, or undesignated Family member shall be entitled to vote.

(d) All members shall have the privilege to attend and be heard at all official meetings of members, and shall have the right to attend all meetings of the Board of Directors, Executive Committee, and standing and special committees of the Association, except during executive sessions thereof.

(e)(1) Fully paid lifetime members and annual members with five or more consecutive years of membership, as shown in the Association's membership records, who have attained the age of 18 years on or before the fiftieth (50th) day prior to the date of the annual meeting of members and who are citizens of the United States of America shall be entitled to vote. Each such member shall be entitled to cast a vote for not more than one person for each vacancy on the Board of Directors to be filled by the membership at any election of

Directors, which vote shall be cast as provided in these Bylaws. In order for such a member to cast a vote at any meeting of members, a properly completed, fully paid application for lifetime membership must have been received by the Secretary on or before the fiftieth (50th) day prior to the date of the meeting, or an annual member must have five years of consecutive membership, as shown in the Association's membership records, and such consecutive membership must be in effect on the fiftieth (50th) day prior to the meeting.

(2) Individual members who are not lifetime members or annual members with five (5) or more consecutive years of membership and who are otherwise qualified to vote pursuant to Section 6(e)(1) above, shall have the right to vote for the seventy sixth (76th) Director on the occasion of the Annual Meeting of Members.

(f) ***Any member shall have the right to circulate and submit petitions for nominating Directors, to be signed by members entitled to vote, as provided in Article VIII, Section 3.***

(g) Members of the Association entitled to vote, and any affiliated organization as defined in Section 4(a) of this Article, shall have the right to petition for removal of any officer, Director, or member of the Executive Council by the procedure provided in Article IX.

(h) Members of the Association entitled to vote shall have the right to demand a special meeting of the members by the procedure provided in Section 8(b) of this Article.

Section 7. Members Holding Office.

The holding of any office or membership on any committee shall be contingent upon membership in good standing in this Association.

Section 8. Meetings of Members.

(a) **Annual Meeting of Members.** The Association shall hold an Annual Meeting of Members to receive the report of the election of Directors and to transact such other business as may properly come before the meeting, at such time

and place as shall be determined by the Board of Directors, but in no case later than November 30th of each calendar year. Notice of the time and place of such meeting shall be published in consecutive issues of the official journal of the Association not less than twice prior to the holding of the meeting.

(b) **Special Meetings of Members.** A special meeting of members of the Association may be called at any time by the President, by the Board of Directors, or by the Executive Committee, or upon demand, in writing, signed by not less than 5% of the members entitled to vote, and stating the specific purpose of the proposed meeting. Notice of the time, place and object of the special meeting shall be published in consecutive issues of the official journal of the Association not less than twice prior to the holding of the meeting. The time and place of such meeting shall be fixed by the President.

(c) **Quorum.** At any annual or special meeting 100 members entitled to vote shall constitute a quorum.

(d) **Presentation of Awards.** No award shall be presented during any meeting of members without the prior approval of the Board of Directors.

Section 9. Duties of Members.

(a) It is the duty of each member to assist in every feasible manner in promoting the objectives of the Association as set forth in Article II of these Bylaws and to act at all times and in every matter in a manner befitting a sportsman and a good citizen.

(b) It is the duty of the officers of organization members to conduct the affairs of their organization in an efficient manner, in accordance with their organization bylaws, and such programs and regulations as may, from time to time, be adopted by this Association. Officers of organization members shall maintain proper records and shall promptly render such reports concerning membership, finances, facilities and activities as may be requested from time to time by the Association. In addition, officers of affiliated organization members shall conduct the affairs of the organization in a fiscally responsible manner, including the development of

an annual budget and the completion of an annual audit.

(c) It is the duty of organization members to maintain their shooting ranges in a state of adequate repair, to operate their ranges in a safe manner under properly qualified supervision and to conduct a continuing program of small arms instruction and competition in compliance with the regulations and program of the Association as currently in effect.

Section 10. Voluntary Termination of Membership.

(a) Any individual member may terminate his or her membership at any time by a resignation in writing sent by first class United States mail to the Secretary of the Association, but such member will not be entitled to any refund of dues or contributions already paid.

(b) Any organization member may terminate its membership at any time by a vote of a majority of the members of such organization at any regular meeting or special meeting called for the purpose, by a resignation in writing accompanied by a copy of the minutes of said meeting sent by first class United States mail by the Secretary of the organization to the Secretary of the Association, but such organization member should not be entitled to any refund of dues already paid.

Section 11. Involuntary Termination of Membership and Disciplinary Proceedings.

(a) **Default.** Any member in default in payment of dues shall be terminated from membership and from all privileges of membership.

(b) **Discipline, Suspension and Expulsion.** Any individual or organization member may be disciplined, suspended, or expelled for good cause, including but not limited to, any conduct as a member that is contrary to or in violation of the Bylaws of the Association; for having obtained membership in the Association by any false or misleading statement; or, without limitation, conduct disruptive of the orderly operation of the

Association in pursuit of its goals; violating one's obligation of loyalty to the Association and its objectives; or willfully making false statements or misrepresentations about the Association or its representatives. No member so suspended or expelled will be entitled to any refund of dues or contributions already paid.

(c) **Notice and Service by Mail.** Where notice is required under this Section, notification shall be by personal service or by a simultaneous first class mailing and certified mailing to the address of record with the Secretary. Notification by mail shall be deemed to have been served five days after mailing.

(d) **Procedure for Discipline, Suspension, or Expulsion.**

(1) Any member of the Association in good standing may file a complaint with the Secretary of the Association against any individual or organization member. Complaints regarding a member's performance or activity at a competition or competitions shall be filed with the Protest Committee and shall be subject to this procedure only if forwarded to the Secretary for such processing by the Protest Committee.

(2) The complaint must be in writing, notarized, and signed by the complainant. It must distinctly describe the cause for which the member's discipline, suspension, or expulsion is sought. No complaint shall be filed or considered with respect to the same facts or transactions as an earlier filed complaint. Except for a complaint based upon a conviction for an offense which prohibits the person from possessing or receiving firearms under federal law, or on facts which could not have been discovered earlier with due diligence, the complaint shall be based solely on facts, events, and transactions that shall have occurred not more than three years prior to the filing of the complaint. All exhibits referred to in the complaint shall accompany the complaint.

(3) The Secretary shall transmit the complaint to the Ethics Committee for consideration at its next meeting.

(4) The Ethics Committee shall determine whether the charges if proved would warrant suspension, expulsion, or other discipline, or should be dismissed.

(5) If the Ethics Committee determines not to dismiss the charges, it shall propose a resolution providing for suspension, expulsion, or other discipline as the appropriate remedy in the event the charges are proved or a hearing is not requested.

(6) The Secretary shall promptly notify the accused member of the proposed suspension, expulsion, or other discipline by mailing him a copy of the resolution. The Secretary shall enclose a copy of the complaint, the exhibits if any, and the Bylaws of the Association. The Secretary shall inform the accused member of the right to a hearing as hereinafter provided and further inform the member that unless the member requests a hearing in writing received by the Secretary within forty-five days after the date of such notice, the proposed resolution will be submitted to the Board of Directors for adoption.

(7) If a hearing is timely requested, the Secretary shall immediately notify the Chairman of the Committee on Hearings. A Hearing Board composed of three hearing officers shall be elected by and from the membership of the Committee on Hearings, none of whom shall have any personal interest in the proceeding. No more than two such hearing officers may be members of the Board of Directors or the Executive Council. The hearing officers shall choose a chairman from among their membership. The Hearing Board shall hold a hearing upon at least sixty days notice to the complainant and the accused.

(8) At the hearing, the complainant, the Association and the accused member may be represented by counsel. The Chairman of the Hearing Board shall preside at the hearing and may rule on all procedural matters. Testimony shall be taken under oath.

(9) At the conclusion of the hearing, the Hearing Board shall determine its recommendation to the Board of Directors.

(10) Upon receiving the recommendation of the Hearing Board, or the proposed resolution of the Ethics Committee in the event a hearing was not timely requested, the Board of Directors, in Executive Session, shall consider the submission at its next meeting and may dismiss the charges or, by a three-quarters vote, order the expulsion, suspension or other discipline of the accused member.

(e) **Confidentiality.** All proceedings under this Section shall be confidential.

(f) If the accused person allows his or her membership to lapse by failing to pay dues or by resigning pending final disposition of the complaint, then such person shall not be eligible to rejoin the Association without permission of the Board of Directors.

Section 12. Committee on Hearings.

The Committee on Hearings shall be appointed by the President and composed of nine members entitled to vote, no more than six of whom shall be members of the Board of Directors or Executive Council.

ARTICLE IV

Board of Directors

Section 1. Composition.

(a) The Board of Directors shall consist of seventy-six (76) Directors as follows:

(1) Seventy-five (75) Directors, elected for three (3) year terms as provided in Article VIII from lifetime members of the Association who are entitled to vote. Each such Director (except such Directors elected to fill unexpired terms) shall hold office from the adjournment of the Annual Meeting of Members at which his election is announced until the adjournment of the third Annual Meeting of Members next following such election or until his successor is elected and qualified. The terms of office of such Directors shall continue to be so arranged that one-third (1/3) of such terms shall

expire at each Annual Meeting of Members or until their successors are elected and qualified.

(2) One (1) Director, elected as provided in Article VIII, Section 4, shall hold office from the adjournment of the Annual Meeting of Members at which he was elected until the adjournment of the next Annual Meeting of Members, or until a successor is elected and qualified.

(b) Conviction of a felony shall be a disqualification for nomination to or service on the Board of Directors unless the Board for good cause determines to the contrary.

Section 2. Powers and Duties.

The Board of Directors shall formulate the policies and govern and have general oversight of the affairs and property of the Association, in accordance with applicable law and these Bylaws. The Board shall elect from among its own members a President and one (l) or more Vice Presidents. It shall also elect the Executive Vice President, Secretary and Treasurer of the Association, members of the Executive Committee, and may elect members to the Executive Council. ***All vacancies in the Board occurring between regular elections for any reason shall be filled by persons who ran and lost on the most recent mail ballot in rank order of number of votes received; and each such person shall serve until the adjournment of the next Annual Meeting of Members.***

Any Director, officer, or employee of the Association who is also a member of the governing body of any business, corporate, or other entity (whether as trustee, director, sole-owner, officer, partner, or the like) which receives from the Association any payment(s) for goods or services which total in excess of $2,000 either within a year or pursuant to any contract or contracts originating within a year shall immediately file a written statement of all such business as to the nature and amount thereof, to the best of his or her knowledge, with the Secretary who shall transmit such

statement to the Board of Directors at its next meeting and who shall include all such statements in the Secretary's report at the next Annual Meeting of Members.

Section 3. Meetings.

(a) ***Regular Meetings. There shall be three regular meetings of the Board of Directors in each year. A first regular meeting of the Board of Directors shall be held within one week after the Annual Meeting of Members and after the election and installation of newly elected members of the Board of Directors as announced at the Annual Meeting of Members. At this meeting of the Board of Directors, the officers for ensuing terms shall be elected and such other business transacted as may properly come before the meeting. The second regular meeting of the Board of Directors shall be held approximately 120 days after the Annual Meeting of Members. The third regular meeting of the Board of Directors shall be held approximately 240 days after the Annual Meeting of Members. The exact time and place of each meeting may be determined by the Board of Directors at the previous meeting, reasonable notice being given.***

(b) **Special Meetings.** A special meeting of the Board of Directors may be held at any time on the call of The President, or by action of the Executive Committee, or upon demand in writing stating the object of the proposed meeting and signed by not less than a majority of the Board. Notice of the time, place and object of such special meetings shall be mailed to each Director at least 30 days before the date of holding such meetings.

(c) **Quorum.** At any regular or special meeting of the Board of Directors 25 members shall constitute a quorum.

(d) Upon a request of 20% of the membership of the Board of Directors present, a roll call vote shall be taken on any specified question. ***Every such roll call vote, together with the***

specified question, shall be published by the Secretary In the official journal within 90 days.

(c) Upon request of 20% of the membership of the Board of Directors present, the names of the persons voting in the affirmative, in the negative and the abstaining, shall be recorded in the minutes of the meeting but not published in the Official Journal.

Section 4. Indemnification and Advancement of Expenses of Directors of the Association.

The indemnification and advancement of expenses of Directors granted pursuant to, or provided by, the corporate laws of the state under which the Association is incorporated shall not be exclusive of any other rights to which a Director seeking indemnification or advancement of expenses may be entitled, and each Director shall be entitled to such indemnification and expenses immediately to the fullest extent requested in writing to the Secretary or Executive Vice President by such Director unless and only unless prohibited by corporate laws of the state under which the Association is incorporated.

ARTICLE V

Officers

Section 1. Number and Election.

(a) The officers of the Association shall be a President, one or more Vice Presidents, an Executive Vice President, a Secretary, a Treasurer, an Executive Director of the National Rifle Association General Operations, and an Executive Director of the National Rifle Association Institute for Legislative Action. The President and Vice Presidents shall be elected annually by and from the Board of Directors. The Executive Vice President, Secretary and Treasurer shall be elected annually by the Board of Directors, and they shall serve until their successors have been elected and

qualified. ***The Executive Vice President shall be elected by the Board of Directors. In the event that the Office of the Executive Vice President becomes vacant, the succeeding Executive Vice President shall be elected by the Board of Directors at its next meeting.*** The President may not succeed himself or herself more than once, after being elected to serve a full term, except that Charlton Heston may succeed himself as President a second time for the term commencing in the year 2000 and ending in the year 2001, and a third time for the term commencing in the year 2001 and ending in the year 2002, and a fourth time for the term commencing in the year 2002 and ending in the year 2003. When two (2) or more candidates are nominated for office, voting for officers shall be by written ballot.

(b) ***The Board may not abolish said offices nor create any other offices.***

Section 2. Duties of Officers.

(a) **President.**

(1) The President shall preside at all meetings of the Association, of the Board of Directors and of the Executive Committee.

(2) With the exceptions of the Nominating Committee, the Committee on Hearings and the Committee on Elections, the President shall be an ex officio member, with vote, of all committees.

(3) Except as otherwise provided in these Bylaws, the President shall appoint all standing and special committees of the Association.

(4) The President shall perform all such other duties as usually pertain to the office.

(b) **Vice Presidents.** The Vice President shall perform the duties of the President in the absence or at the request of the President. In case a vacancy shall occur in the office of the President, the first Vice President shall become President and shall serve for the balance of the term. In case more than one Vice President is elected by the Board of Directors, each Vice President shall be designated in succession by number, and in case of a vacancy

shall succeed to the next higher office. With the exceptions of the Nominating Committee, the Committee on Hearings and Committee on Elections, the Vice Presidents shall be ex officio members, with vote, of all committees. The Vice Presidents shall perform such duties as may be delegated by the President or assigned by either the President or the Board of Directors.

(c) **Executive Vice President.** The Executive Vice President shall direct all the affairs of the Association in accordance with the programs and policies established by the Board of Directors. Among his authorities, the Executive Vice President shall be empowered to (1) appoint, suspend with or without pay, or remove the Executive Director of the National Rifle Association General Operations or the Executive Director of the National Rifle Association Institute for Legislative Action; (2) suspend with pay the Secretary or the Treasurer until the next meeting of the Executive Committee or the Board of Directors, whichever occurs first; and (3) employ, suspend with or without pay, or dismiss any employee.

(d) **Secretary.** The Secretary, under the direction of the Executive Vice President, shall have the following duties: (1) have charge of the archives of the Association; (2) attend to the proper publication of official notices and reports, attest documents, and perform such other duties as usually pertain to the office; (3) have such other duties as may be assigned from time to time by the Board of Directors, the Executive Committee, and/or the Executive Vice President; and, (4) shall be Secretary of the Board of Directors, the Executive Committee, the Nominating Committee and the Committee on Elections.

(e) **Treasurer.** The Treasurer shall operate in accordance with the financial policies set forth by the Board of Directors or the Executive Committee, and shall have charge of the books of account and financial operations of the Association. The Treasurer shall regularly report his or her recommendations regarding the financial affairs of the Association to the Finance Committee,

Executive Vice President, the Board of Directors, and the Executive Committee. The Treasurer shall assist a firm of certified public accountants selected by the Board of Directors to make an annual audit of the Association's books of account and prepare a statement of financial conditions as of the close of each fiscal year as may be established by the Board of Directors, and shall furnish a copy of such statement, together with the certificate of audit, to each member of the Board of Directors. The funds of the Association shall be placed in such bank or banks as may be designated by the Board of Directors. The Treasurer shall have such other duties as may be assigned to him or her from time to time by the Board of Directors, the Executive Committee, and/or the Executive Vice President.

(f) **Executive Director of the National Rifle Association General Operations.** The Executive Director of the National Rifle Association General Operations shall have such powers and duties as delegated to him from time to time by the Executive Vice President. In case of a vacancy in the office of the Executive Vice President, the Executive Director of the National Rifle Association General Operations shall automatically become the Executive Vice President and serve as such until the next ***meeting of the Board of Directors.***

(g) **Executive Director of the National Rifle Association Institute for Legislative Action.** ***The Executive Director of the National Rifle Association Institute for Legislative Action shall, under the direction of the Executive Vice President, conduct the legislative, legal, informational, fund raising activities, operational, administrative and financial*** affairs of the Institute in accordance with the programs and policies established by the Board of Directors. The Executive Director of the Institute shall appoint a Fiscal Officer who shall have charge of the books of account of the Institute, and said Fiscal Officer shall assist the firm of Certified Public Accountants selected to make an annual audit of the books of account of the Institute, and in the preparation of a statement of financial condition of the Institute to be included as a part of the audit and incorporated in the statement of condition of the

National Rifle Association of America referred to in subsection 2(e) of this Article. The funds donated to the Association for the use of the Institute or allocated and transferred by direction of the Board of Directors from the Association's other funds, or which are otherwise received by the Institute, shall be placed in such bank or banks, as may be designated by the Board of Directors in accounts designated as "The National Rifle Association-Institute Account," and may be withdrawn only on checks signed by the Fiscal Officer of the Institute and such other signatures as the Board of Directors may prescribe; provided, however, that the Board of Directors may authorize the establishment of special accounts for specific operations or for the payment of routine bills not requiring the Fiscal Officer's signature. Once each fiscal year the Treasurer of the Association shall conduct an internal audit of the books of the Institute and of its general financial condition. The Executive Director, Fiscal Officer and the staff of the Institute shall assist the Treasurer in such internal audit.

(h) The Executive Vice President, the Secretary, the Treasurer, the Executive Director of the National Rifle Association General Operations and the Executive Director of the National Rifle Association Institute for Legislative Action shall be ex officio members, with voice but without vote, of the Board of Directors, the Executive Committee and all committees, special and standing, of the Association, except the Nominating Committee, Committee on Hearings, Officers Compensation Committee and Committee on Elections, and shall be authorized but not required to attend the meetings; provided, however, that the aforesaid officers shall not attend or participate in executive sessions except by invitation of the respective committee or Board.

Section 3. Suspension and Removal.

(a) **Elected Non-salaried Officers.** Any elected non-salaried officer of the Association may be suspended with or without cause by the Executive Committee by a three-fourths (3/4) affirmative vote of the members of the Executive Committee present at any regular or special meeting, such suspension

to be effective until the next meeting, either regular or special, of the Board of Directors. Any such officer may be removed with or without cause by the Board of Directors, by a three-fourths (3/4) affirmative vote of the members of the Board of Directors present at any regular or special meeting of the Board of Directors. No vote on suspension or removal may be taken unless at least fifteen (15) days notice in writing shall have been given to the officer of the proposed suspension or removal and of any charges preferred (if the proposed suspension or removal is for cause) and of the time and place of the meeting of the Executive Committee or of the Board of Directors, at which such charges will be considered. Notice of the time, place and object of such meeting, with a full copy of any charges preferred shall be mailed to each member of the Executive Committee or of the Board of Directors at least fifteen (15) days in advance of the meeting. At such meeting the officer whose suspension or removal is proposed shall be accorded a full hearing and may be represented by counsel.

(b) **Elected Salaried Officers.** Any Officer elected by the Board of Directors who is a salaried employee may be suspended with or without cause and with or without pay at any time by the Executive Committee by a three-fourths (3/4) affirmative vote of the members of the Executive Committee present at any regular or special meeting. Such suspension shall be effective until the next meeting, either regular or special, of the Board of Directors. Any such Officer may be removed with or without cause at any time by the Board of Directors, by a three-fourths (3/4) affirmative vote of the members of the Board of Directors present at any regular or special meeting of the Board of Directors. No vote on removal may be taken unless at least fifteen (15) days notice in writing shall have been given to the officer of the proposed removal and of any charges preferred (if the proposed removal is for cause) and of the time and place of the meeting of the Board of Directors at which such charges shall be considered. Notice of the time, place and object of such meeting with a full copy of any charges preferred shall be mailed to each member of the Board of Directors at least fifteen (15) days in advance of the meeting.

At such meeting, the officer whose removal is proposed shall be accorded a full hearing and may be represented by counsel.

Section 4. Vacancies.

Except as otherwise provided in Section 2(c) and (f) hereof, in the event of the death, resignation, suspension, removal or permanent disability of any officer, the vacancy thereby caused may be filled by the Executive Committee until the next meeting of the Board of Directors. Except as otherwise provided in Section 2(b) and (c), hereof, the Board of Directors shall elect a replacement to serve out the balance of the term of any such officer.

Section 5. Compensation.

(a) No Director or member of the Executive Council shall receive any salary or other private benefit unless specifically authorized by resolution of the Board of Directors or an authorized committee thereof, but all such persons shall be entitled to reimbursement for expenses incurred on behalf of the Association, to such extent as may be authorized or approved by the Board of Directors.

(b) There shall be an Officers Compensation Committee, which shall consist of the President, who shall serve as the Chairman, the First Vice President and the Second Vice President. In case there shall be no Second Vice President, the President shall appoint a Director to serve in his place.

(c) At the fall meeting of the Directors, the Officers Compensation Committee shall recommend to the Board, and the Board shall, at the same meeting, establish by resolution the authorized compensation for the next budget year for all elected salaried officers, who shall be the Executive Vice President, the Secretary, and the Treasurer. Nothing contained herein shall preclude other meetings of the Officers Compensation Committee as may be called by the President, which may include consideration of the salaries of newly elected salaried officers or of prospective candidates to fill vacancies among the elected salaried officers pursuant to the provisions of Article V, Section 4 of these Bylaws.

All deliberations by the Board of Directors concerning such compensation shall be held in an executive session, at which none of the officers whose compensation is to be or is being established may attend, except for the limited time and limited purpose of answering questions asked by any member of the Board of Directors at the meeting.

(d) The compensation of the Executive Director of the National Rifle Association General Operations and the Executive Director of the National Rifle Association Institute for Legislative Action shall be established by the Executive Vice President.

Section 6. Bonds.

All officers and employees handling moneys of the Association shall be bonded in such amount as may be determined by the Board of Directors. The expense of furnishing such bonds shall be paid by the Association.

ARTICLE VI

Executive Committee

Section 1. Composition.

(a) There shall be an Executive Committee consisting of the President, any Vice Presidents and 20 members elected from the Board of Directors, as herein provided.

(b) The 20 members of the Executive Committee nominated by the Nominating Committee or from the floor at any meeting of the Board of Directors, and elected annually by and from said Board, shall serve until their successors are elected and qualified.

Section 2. Powers and Duties.

The Executive Committee shall exercise all the powers of the Board of Directors when said Board is not in session, other than the power to:

(a) Repeal or amend the Bylaws, or adopt new Bylaws;

(b) Fill vacancies on the Board of Directors or the Executive Committee;

(c) Fix the compensation of Directors or Officers;

(d) Remove a Director, with or without cause;

(e) Amend or repeal any resolution of the Board, which by its terms shall not be amendable or repealable;

(f) Adopt and disseminate a fundamental change of view, or basic policy, or basic organizational structure of the Association;

(g) Approve the submission of matters to the members, or submit to the members any action requiring member approval under the applicable statute;

(h) Purchase, sell, mortgage, or lease real property of the Association, or adopt a corporate resolution recommending the sale, lease, exchange or other disposition of all or substantially all the assets of the Association, or authorize major new construction;

(i) Present a petition for judicial dissolution, or to adopt plans of merger, consolidation, or nonjudicial dissolution;

(j) Authorize indemnification of Officers, Directors, members of the Executive Council, or employees; or

(k) Formulate such other corporate policy decisions or perform corporate activities of the Association of such major significance as to warrant action by the full Board of Directors.

Section 3. Vacancies in the Executive Committee.

A vacancy in the Executive Committee may be filled by a majority vote of the entire Board of Directors.

Section 4. Meetings of the Executive Committee.

(a) *Meetings of the Executive Committee will be held on the call of the President, reasonable notice being given.*

(b) A special meeting shall be called by the President within twenty-one (21) days of receipt by the Secretary of a demand in writing stating the specific object of the proposed meeting and signed by no less than a majority of the committee.

(c) Notice of the time and place of any Executive Committee meeting, and the stated specific object of any special meeting, shall be sent to each member of the committee, the Board of Directors, and the Executive Council. Other than for a conference telephone meeting pursuant to Article XI, Section 7, such notice shall be sent at least five (5) business days in advance of the meeting. For a conference telephone meeting, such notice shall be sent at least 48 hours in advance of the meeting, except that notice sent less than 48 hours in advance shall be deemed sufficient upon confirmation of delivery to all members of the committee. Members of the Board of Directors who are not members of the committee shall be entitled to attend such meetings at their own expense.

(d) Twelve members of the Executive Committee shall constitute a quorum.

ARTICLE VII

Executive Council

Section 1. Composition.

(a) There shall be an Executive Council which shall be advisory to the Executive Committee and the Board of Directors. Any member of this Association whose advice and counsel, in the opinion of the Board of Directors, will be valuable to the continuing welfare of the Association may be elected thereto for life by said Board of Directors.

(b) Any member of the Association may be nominated by any member of the Board of Directors or Executive Council and be elected to the Executive Council for life subject to removal as provided in Section 3 by said Board of Directors.

Section 2. Rights and Privileges.

(a) The members of the Executive Council shall have the right to sit with the Executive Committee

and Board of Directors at all regular and special meetings, including any executive sessions thereof. The Executive Council members shall have all rights and privileges of members of the Executive Committee or full Board of Directors, including the right to sponsor Bylaw amendments, to introduce or second motions, debate, serve as a full voting member on, or as chairman or vice chairman of standing or special committees; but Council members who are not members of the Board of Directors shall have no right to vote at meetings of the Executive Committee or the Board of Directors.

(b) The Executive Council shall perform such acts and duties as may be specifically delegated to it by these Bylaws, or by the President, the Executive Committee or the Board of Directors.

(c) Any member may serve simultaneously on the Board of Directors and the Executive Council.

Section 3. Removal.

Any member of the Executive Council may be removed for cause by the Board of Directors at any regular or special meeting of the Board of Directors pursuant to procedures outlined in Article V, Section 3(a).

For the purposes of this Article "cause" is set forth in Article III, Section 11(b) of these Bylaws.

ARTICLE VIII

Nomination and Election Procedures (For Election of Director by the Mail Ballot)

Section 1. Nominating Committee.

(a) ***At each regular meeting of the Board of Directors next following the Annual Meeting of Members, the Board shall elect, by secret ballot, a Nominating Committee which shall be responsible for nomination of Directors, members of the Executive Committee, and officers who are to be elected at the next annual meeting of members or at a subsequent meeting of the Board of Directors.*** Any vacancy in

the Nominating Committee occurring between regular annual elections may be filled by majority vote of the Board of Directors. ***The Nominating Committee shall also serve as an appeals board of first resort by members seeking to contest a ruling by the Secretary of the Association as to the validity of a petition for nomination of a candidate to elected office in the Association.***

(b) The Nominating Committee shall be composed of nine members entitled to vote, no more than six of whom shall be members of the Board of Directors or Executive Council. Nominations for election to the Nominating Committee shall be made from the floor. Following the close of nominations for membership on the Nominating Committee, each Director present at the meeting shall receive one ballot listing the nominees, on which he is entitled to cast not more than one vote for each of nine nominees, of whom not more than six may be members of the Board of Directors or the Executive Council. All nominees for the Nominating Committee shall be voted on together, with the nine receiving the greatest number of votes being elected; provided, however, that no more than six nominees who are members of the Board of Directors or Executive Council shall be elected. In case of a tie for the last vacancy, a run-off vote shall be conducted between the nominees tied. A Director whose term expires at the end of the ensuing year shall not be eligible for election to the Nominating Committee. Notwithstanding any other provision of these Bylaws, no person elected to the Nominating Committee shall be eligible for election as a Director during the tenure of the Nominating Committee to which he was elected; nor shall any officer be a member or ex officio member of the Nominating Committee.

(c) No person shall be eligible for election to the

Nominating Committee more often than once every three years.

Section 2. Nomination and Election of Directors.

(a) Directors shall be elected from among the lifetime members of the Association. Annual nominations to fill vacancies on the Board of Directors shall be made by the Nominating Committee and by the members through the petition process described in this Article. Annual elections shall be by mail ballot vote of members entitled to vote. The Committee on Elections shall be responsible for the tabulation of the votes, and shall report the results of the election at the Annual Meeting of Members. The provisions of this Article do not apply to the filling of interim vacancies on the Board of Directors, as provided in Article IV, Section 2.

(b) Not later than 240 days prior to each Annual Meeting of Members, the Secretary shall provide notice in the official journal of the Association of the date and place of such Annual Meeting, of the date and place of the meeting of the Nominating Committee at which nominations for Director will be made, and of the procedure for nomination and election of Directors. The notice shall be accompanied by a blank form requesting the recommendation of suitable nominees to be considered by the Nominating Committee. An individual or organization member may make one or more recommendations. The Secretary shall again give notification of the Annual Meeting of Members by publication in the official journal of the Association not less than 30 days prior to the time of such Annual Meeting of Members.

(c) Recommendations for nomination by the Nominating Committee must be received by the Secretary not less than twenty days prior to the published date of the meeting of the Nominating Committee to select nominees for the office of Director. The Secretary shall promptly confirm the eligibility of persons recommended and transmit the recommendations to the Nominating Committee.

(d) Not less than one hundred eighty (180)

days prior to the Annual Meeting of Members the Nominating Committee shall meet to select from among the members entitled to hold the office of Director a list of nominees. Not less than sixty (60) days prior to the Annual Meeting of Members, the names of the nominees selected by the Nominating Committee and by the petition process described in Section 3 shall be published in the official journal of the Association, together with a short biographical sketch of each. Biographical sketches shall be limited to biographical facts and shall be submitted to the Secretary of the Association by each candidate and shall be sworn to or affirmed by the candidate as being truthful in every respect. Any willful material misrepresentation contained therein shall invalidate the candidacy provided that (1) such misrepresentation shall first be brought to the attention of the candidate by the Secretary, and (2) the candidate persists in the inclusion of such misrepresentation in the biography by submitting a further sworn statement or affirmation reaffirming the truthfulness thereof. The decision of the Secretary of the Association in matters concerning biographies shall be final.

(e)(1) At least forty-five (45) days prior to the date of the Annual Meeting of Members, the Secretary shall mail a printed ballot to each member entitled to vote as provided in Article III, Section 6(e)(1), directed to his last address on record with the Secretary; provided, however, that to receive said ballot all qualifications described in Article III, Section 6(e)(1) must have been met on or before the fiftieth (50th) day prior to the Annual Meeting of Members, and a properly completed, fully paid application for lifetime membership must have been received, or an annual member must have five or more years of consecutive membership, as shown in the Association's membership records, on the fiftieth (50th) day prior to the date of the Annual Meeting at which the election of directors is announced.

(2) The ballot shall list thereon the names, cities and states of principal residence of all nominees proposed by the Nominating Committee, as well as the names, cities and states of principal

residence of those nominated by the petition process pursuant to the provisions of Section 3 hereof. The order of the names on the ballot shall be rotated as determined by the Committee on Elections. The ballot shall provide five blank spaces for write-in candidates. A return envelope with means for authentication, including a place for signature and address of the member, shall be enclosed with each ballot. The final date on or before which the ballot must be received by the Association in order for it to be counted shall be shown clearly on the face of the ballot.

(f) A member eligible and desiring to vote shall clearly mark his ballot for his choice of Directors. He may make his selection from the list of candidates printed on said ballot, and/or he may write the name, together with the city and state of principal residency of each other member whom he wishes to be on the Board and believes to be eligible to hold the office of Director. In any event, if his ballot is to be valid, he must not vote for a number of candidates greater than the total number of Directors to be elected by the mail ballot. Having marked his ballot and signed the authentication, the member must place and seal the ballot in the return envelope. Any ballot received by the Association later than the 20th day preceding the date of the Annual Meeting of Members shall be invalid and shall not be opened or counted.

(g) Prior to the Annual Meeting of Members the President each year shall appoint a Committee on Elections, no member of which shall himself be a nominee proposed by the Nominating Committee or by the petition process described in Section 3 hereof, to conduct the election of Directors. It shall be the duty of that Committee to determine whether every member elected to the office of Director is eligible to hold the office. The Executive Vice President shall, at the request of the President or the Chairman of the Committee on Elections, make available such employees of the Association as may be necessary to assist the Committee in the examination and validation of the ballots as set forth in subsection (h) of this section.

(h) Upon the receipt of a ballot by the

Association on or before the prescribed latest date, the Committee on Elections shall verify the name of the voter against the rolls of members entitled to vote, and verify the eligibility to hold the office of Director of any write-in names on the ballot. A ballot shall be invalid if not cast on the official printed ballot form provided by the Secretary; or if not received by the Association on or before the prescribed latest date specified on the ballot; or if not authenticated by a member entitled to vote; or if more than one ballot is received from the same voter; or if the ballot is not clearly marked; or if the ballot contains more than one vote for a single candidate; or if the ballot contains votes for more than the number who are to be elected Directors. No ballot shall be invalidated for failure to contain a vote for one person for each of the vacancies to be filled at said election.

(i) A ballot judged invalid shall have the reason noted thereon and be initialed by the person who examined it. All ballots, whether judged valid or invalid, and all returned envelopes, including authentication, shall be preserved by the Association for 120 days. Up to that time, any member entitled to vote may make application to the Executive Committee or the Board of Directors, whichever shall meet first, for a canvass or recount upon such terms and conditions as that body may prescribe, and for redress thereafter, if appropriate. If no such application is made before the time herein specified, all protests and grievances concerning the election shall be deemed to have been waived, and the ballots and return envelopes including authentications may then be destroyed.

(j) The Committee on Elections shall serve as election tellers and the chairman of the committee shall announce the results of the election when called upon to do so by the presiding officer at the Annual Meeting of Members. The chairman of the Committee on Elections shall include in his report the total number of ballots received, the total number of all ballots judged valid and judged invalid, and the total number of votes received by each person. The chairman shall declare elected to regular three (3) year terms those persons who, in numbers equal

to the number of such vacancies, receive the largest number of the votes cast; and shall declare elected to specified incomplete terms, if any, beginning with the longest remaining incomplete term or terms, those persons who receive the next largest number of votes cast. In the event of a tie vote between two or more persons for the last vacancy to be filled in any term at issue, the tie shall be decided by lot by a means to be determined by the Committee on Elections.

(k) The results of the election by mail ballot as announced at the annual meeting shall be published in the Official Journal within 90 days after such announcement.

Section 3. Nomination of Directors by Petition.

(a) In addition to such persons as are selected by the Nominating Committee as provided in Section 2 of this Article, an individual qualified to hold office may be nominated for Director by petition of the members.

(b) Any member ("sponsor") may circulate a petition calling for the nomination of a qualified member for the office of Director. A petition shall be valid only if received by the Secretary not more than 45 days after the announced date of the meeting of the Nominating Committee to select nominees for the office of Director. A petition may consist of multiple pages, but all pages must be submitted by the proposed nominee. The Secretary shall prescribe the format of the petition and furnish forms upon request. No petition for nomination of a person for the office of Director shall contain the name of more than one proposed nominee, nor shall a petition be submitted to the Secretary which contains the name of more than one proposed nominee per sheet. No petition for nomination of a person for the office of Director shall be valid without the proposed nominee's written permission filed with the Secretary on or before

the last day for submission of petitions. The petition may contain a brief resume approved by the proposed nominee. The name of a sponsor(s) shall be indicated on each sheet of the petition. The petition must bear the original handwritten signatures, names, membership identification numbers, addresses and date of signing of a number of members eligible to vote that is not less than 0.5% of the number of valid ballots cast in the most recent mail ballot election of directors, which number shall be provided by the Secretary to any member upon request. Each petition shall indicate the proposed nominee's principal city and state of residence, and not more than five petition nominees shall be from any one state during any one year. In the event there are petitions for more than five proposed nominees from one state, the five proposed nominees who have the greatest number of signatures on the petition shall be nominated; provided, however, that in case of ties, the Nominating Committee shall select by lot among those having the same number of petition signatures. In no event shall the date of signing be prior to the adjournment of the most recent annual meeting of members.

(c) The Secretary shall immediately determine the validity of all petitions received and the eligibility of all signatories to vote.

(d) In the event the petition shall have been found invalid, the Secretary shall immediately notify the proposed nominee and the sponsor(s) stating the reasons for such ruling. The proposed nominee or a sponsor may appeal this ruling to the Nominating Committee in writing within fourteen days of such notice. If the petition is ruled valid by the Nominating Committee,

the proposed nominee shall be certified as a nominee. If the petition is denied by the Nominating Committee, the proposed nominee or a sponsor may appeal to the Board of Directors who shall act on the appeal at the next Board meeting. If said Board rules the petition valid, the proposed nominee shall be declared a nominee for the next annual election of Directors.

(e) On the official ballot for the election of Directors, no persons nominated by petition nor by the Nominating Committee shall be so designated. Nothing contained in this section shall prohibit publication of the Report of the Nominating Committee in any copy of the Association's official journals; nor prohibit any candidate from designating the method or methods of nomination in his or her biographical sketch; nor prohibit paid advertisements from containing such information.

(f) All applicable rules of Section 2 of this Article shall apply equally to all nominees, whether selected by petition or Nominating Committee.

Section 4. Election of One Director at Annual Meeting of Members.

One Director shall be elected for a one-year term on the occasion of each Annual Meeting of Members by a plurality of the votes cast by those individual members present in person (and not by proxy) who are entitled to vote pursuant to Article III, Section 6(e). Such Director shall be chosen only from those persons who were nominated as candidates for election for Director in the mail ballot (Article VIII) immediately preceding said Annual Meeting of Members, but who failed to be elected thereby.

ARTICLE IX

Removal of Association Officials by Recall

Section 1. Petition for Removal by Recall.

Notwithstanding any other provision of these Bylaws, any voting member of the Association ("sponsor") may in a single petition call for the removal of one officer, or Director, for good cause, in the manner hereinafter provided. For the purposes of this Article, "good cause" is set forth in Article III, Section 11(b) of these Bylaws.

Section 2. Procedure.

(a) ***Not less than 270 days prior to any Annual Meeting of Members of the Association, any member entitled to vote (the "sponsor") may submit to the Secretary of the Association a petition in writing which calls for or proposes such removal.***

(b) ***In order to be valid:***

(1) Such petition for removal shall be in writing, notarized, and signed in handwriting by the sponsor, and must be received by the Secretary no later than the deadline specified in subsection (a) of this section. It shall distinctly describe the cause for which the person's removal from office is sought, and except for a petition based upon a conviction for an offense which prohibits the person from possessing or receiving firearms under federal law, or in cases of newly discovered evidence which could not have been discovered earlier with due diligence, shall be based solely on facts, events, and transactions that shall have occurred not more than three years prior to the filing of the petition. No petition shall be filed or considered with respect to the same facts or transactions as an earlier filed petition for the removal of the same person, or if it contains willful false statements or misrepresentations, or

if it is completely without merit under law (including these Bylaws), or if it is filed to harass or maliciously injure another, to disrupt the orderly operation of the Association in pursuit of its goals, or for any other improper purpose.

(2) The petition shall contain the names, addresses, membership identification numbers, original handwritten signatures and dates of signing of a number of members eligible to vote that is not less than 5% of the number of valid ballots cast in the most recent mail ballot election of directors, which number shall be provided by the Secretary to any member upon request. A petition may consist of multiple pages, but all pages must be submitted by the sponsor.

(3) At least three states of the United States of America shall be represented on the petition by the signatures of no fewer than 100 residents of each such state, as reflected by each signor's last address of record furnished to the Secretary.

(4) Such petition shall contain no signature for which the date of signing is prior to the adjournment of the most recent Annual Meeting of Members.

(5) Such petition shall clearly state that it may be withdrawn by the sponsor without notice to, or approval by, the signatories.

(c)(1) The Secretary shall rule a petition invalid if it fails to comply with any provision of section (1) of this article or of subsections (a) or (b) of this section.

(2) In the event a petition is ruled invalid by the Secretary, he shall immediately notify the sponsor of the petition and the person whose removal is sought, stating the reasons for such ruling. The sponsor may appeal this ruling to the Committee on Hearings, by a written notice that must be received by the Secretary within 21 days of the Secretary's ruling. The Committee on

Hearings shall meet within 10 days to hear such an appeal. The party not prevailing in the appeal to the Committee on Hearings may appeal within 10 days of the ruling by the Committee on Hearings, to the Executive Committee, which shall hold a conference telephone meeting within 10 days to act on the appeal, and the decision of that body shall be final.

(d) In the event that the petition is ruled valid by the Secretary, the person whose removal is sought, and the sponsor of the petition, shall be notified immediately. The person whose removal is sought shall have the right, upon written request received by the Secretary within 10 days of the Secretary's ruling, to inspect the petition, and to appeal the Secretary's ruling, in writing, to the Committee on Hearings within 21 days of such ruling. The Committee on Hearings shall meet within 10 days to hear such an appeal. The party not prevailing in the appeal to the Committee on Hearings may appeal within 10 days of the ruling by the Committee on Hearings, to the Executive Committee, which shall hold a conference telephone meeting within 10 days to act on the appeal, and the decision of that body shall be final.

(e) If, after all appeals, the petition is ruled valid:

(1) A Hearing Board shall be elected as prescribed in Article III, Section 11(d).

(2) The Hearing Board shall schedule and conduct a hearing as soon as possible at a time and place determined by the Secretary. The hearing shall be conducted in accordance with Article III, Section 11(d)(8). The Hearing Board shall make a complete record of all testimony and exhibits presented, and within 21 days of the date of the hearing shall prepare a written opinion, or a majority opinion and minority view, and a recommendation concerning a

disposition of the petition. All proceedings under this subsection shall be confidential.

(f) At the time the Secretary mails out printed ballots to each member of record entitled to vote for the election of Directors, as provided in Article VIII, Section 2(e), he shall also enclose the printed recall ballot containing the name and office for each such person whose removal was the subject of a valid petition, together with a copy of the recommendation of the Hearing Board, including the minority view if the recommendation is not unanimous. Statements not exceeding five hundred words may also be enclosed in the mailing by the sponsor of the petition for recall and by each person whose removal was the subject of a valid petition. The recall ballot shall state as follows:

> ***"Shall (name of office-holder) be removed from membership on the Board of Directors?" (or other specific office in the Association).***

(g) In the recall voting procedure, the applicable provisions of Article VIII, Section 2, paragraphs (f), (g), (h), (i), (j), and (k) of these Bylaws shall apply to the use and authentication of prescribed official ballot forms, their validation, the counting of votes, and the announcement of results.

(h) If a majority of votes cast on the recall ballot by members of record entitled to vote shall call for the removal of an officer or Director, the removal shall be effective immediately upon certification of the results of a mail ballot recall procedure by the Committee on Elections.

(i) In any event, the Secretary shall immediately notify the person whose removal was petitioned and voted upon as to the results of a mail recall ballot, shall simultaneously inform the officers and Directors of the Association of such results and whether a resulting vacancy exists, and

shall cause the results of such recall vote to be published in an official publication of the Association as soon as possible.

(j) At any stage of the proceedings under this Article, the sponsor of a petition may, with the written consent of the person against whom the recall petition was directed, withdraw the petition or otherwise terminate the proceedings provided for under this Article by so requesting in writing. At the written request of the person against whom the petition was directed, an announcement of the withdrawal or termination shall be published forthwith in the official journal of the Association.

Section 3. Filling of Vacancies Created by Removal of Office-Holder by Membership.

In the event an officer or Director is removed by recall vote of the membership, the vacancy shall be filled pursuant to the provisions of Article V, Section 4 for officers and Article IV, Section 2 for Directors; provided, however, that no person removed from office by the membership shall be returned to that office by the Board of Directors acting under this provision.

ARTICLE X

National Rifle Association Institute for Legislative Action

Section 1. Name and Function.

The National Rifle Association Institute for Legislative Action shall have sole responsibility to administer the legislative, legal, informational and fund raising activities of the Association relating to the defense or furtherance of the right to keep and bear arms, in accordance with the objectives and policies established by the Board of Directors.

Section 2. Officers.

The Executive Director and Fiscal Officer shall have the duties set forth in Article V, Section 2(g). The Executive Director shall be in general charge of the Institute, shall be responsible for hiring, firing and establishing salary schedules for the remaining staff of the Institute, in accordance with the approved budget and other directives of the Board of Directors.

Section 3. Planning.

At least annually the Executive Director shall prepare and submit to the Board of Directors for approval a detailed plan of action in the following areas:

(a) Federal legislative activity.

(b) Legislative action organization development and operation in the political subdivisions of the United States.

(c) Legal action.

(d) Legislative information gathering and dissemination.

(e) Such other legislative activity as may be advisable.

(f) Fund raising for the above activities.

Section 4. Reports.

In addition to the planning recommendation under Section 3, the Executive Director shall report to the Board of Directors and the Executive Committee at each meeting thereof as to the activities of the Institute. The report shall indicate specifically all necessary compliance by the Association and its Institute with the applicable Federal, state and local laws regulating legislative activity.

Section 5. Directives.

The Board of Directors shall by resolution from time to time set the legislative, legal action, political education, and informational objectives and policies of the Association relating to the defense or furtherance of the right to keep and bear arms,

and shall give specific directions to the Institute in these and such other matters as the Board shall deem advisable.

Section 6. Prohibition of Political Contributions.

Neither the Association, its Institute for Legislative Action, nor any officer, Director, employee, or agent acting on behalf of the Association or its Institute for Legislative Action, shall make any contribution to a political campaign, candidate, or political committee.

ARTICLE XI

Standing and Special Committees of the Association.

Section 1. Standing Committees.

(a) The standing committees of the Association are as follows:

Action Shooting
Air Gun
Audit
Black Powder
Bylaws & Resolutions
Clubs & Associations
Collegiate Programs
Competition Rules & Programs
Disabled Shooting Sports
Education & Training
Elections
Ethics
Finance
Grassroots Development
Gun Collectors
Hearings
High Power Rifle
Hunting & Wildlife Conservation
Law Enforcement Assistance
Legal Affairs
Legislative Policy
Membership
Military and Veterans' Affairs
* Nominating
**Officers Compensation
Outreach
Pistol
Protest
Public Affairs
Publications Policies
Range Development
Shotgun
Silhouette
Smallbore Rifle
Sport Shooting
Women's Policies
Youth Programs

*Members elected by the Board of Directors, pursuant to Article VIII, Section 1.

**Members designated pursuant to Article V, Section 5.

(b) At least once each year, each standing committee shall submit a written report through the Secretary of the Association to the Board of Directors at a regular meeting of the Board, and at such other time as may be requested by the President. It may also make written reports and recommendations to the Board or to the Executive Committee at any regular or special meeting.

Section 2. Special Committees.

The President or the Board of Directors may establish such special committees of the Association as may be deemed necessary from time to time to fulfill the objectives of the Association. Each special committee will report at such time and place as may be specified by the President or the Board of Directors.

Section 3. Committee Members Appointed by President.

Except as otherwise provided in Article V, Section 5, for the designation of members of the Officers Compensation Committee, in Article VI, Section 1(b), for the election of members of the Executive Committee, and in Article VIII, Section 1, for the election of members of the Nominating Committee, members of the Board of Directors or of the Executive Council or other members of the Association in good standing may be appointed by the President to membership on such standing and special committees of the Association as may be established, and shall serve at the pleasure of the President or until the adjournment of the next Annual Meeting of Members, or until their successors have been duly appointed, whichever last occurs.

Section 4. Responsibilities of Committees.

The President or the Board of Directors shall assign responsibilities to the committees relating to the administration, conduct, regulation, or oversight

of particular activities or special areas or endeavors of the Association, except that no corporate authority may be delegated to any committee unless all members of such committee are members of the Board of Directors of the Association, and unless such committee has been delegated such authority by a resolution adopted by a majority of the entire Board of Directors.

Section 5. Limitations on Powers of Committees.

No special or standing committee of the Board or of the Association shall exercise any powers prohibited to the Executive Committee.

Section 6. Committee Organization; Meetings.

Committee chairmen are authorized to appoint subcommittees and ad hoc committees from among the members of their respective full committee, as the chairman deems necessary. Official meetings of the committees or subcommittees thereof shall be authorized by the President or, in the absence of the President, by a Vice President or the Executive Vice President. Each respective Chairman shall inform the Secretary, who will issue the official notice for such meeting.

Section 7. Conference Telephone Meetings.

Members of any committee of the Association may participate in a meeting of such committee conducted by means of a conference telephone or similar communications equipment allowing all persons participating in the meeting to hear one another at the same time. Participation by such means shall constitute presence in person at a meeting.

ARTICLE XII

Prohibition of Proxy Voting

At all meetings of the Board of Directors, Executive Committee, other committees of the Association, and meetings of members, each person entitled to vote shall have a right to cast one vote on each question presented, which vote shall be cast in person and not by proxy.

ARTICLE XIII

Corporate Seal

The Association shall have a corporate seal bearing the words "National Rifle Association of America Corporate Seal." The Seal which is impressed on the title page of these Bylaws is the corporate seal of this Association.

ARTICLE XIV

Order of Business

Section 1. Order of Business.

(a) The following shall be the regular order of business at all meetings of the members:

1. Opening Prayer, Pledge of Allegiance, and National Anthem.
2. Roll call.
3. Adoption of agenda (only if it is proposed to supplement or supersede this order of business).
4. Approve minutes of previous meeting.
5. Reports of officers.
6. Report of Committee on Elections.
7. New Business: Resolutions.

(b) The following shall be the regular order of business at all meetings of the Board of Directors:

1. Opening Prayer and Pledge of Allegiance.
2. Roll call.
3. Adoption of agenda (only if it is proposed to supplement or supersede this order of business).
4. Approve minutes of previous meeting.
5. Introductions, presentations and recognitions.
6. Reports of officers.
7. Reports of standing committees.
8. Reports of funds and special committees.
9. Unfinished business (only if items have come over from the previous meeting because the board adjourned without completing its order of business, regardless of the length of time between meetings).
10. New Business: Resolutions.
11. Good of the Order.
12. Closing prayer.

(c) At any meeting an agenda may be adopted. If it supplements but does not conflict with the order of business provided in these bylaws, its adoption requires a majority vote; if it conflicts with that order of business, its adoption requires a two-thirds vote.

Section 2. Parliamentary Authority and Parliamentarian.

(a) Parliamentary Authority. *Roberts Rules of Order Newly Revised* shall govern the deliberations of all meeting of the members, Board of Directors, Executive Committee, and all other standing committees, special committees, and subcommittees unless specific exceptions are made herein.

(b) Parliamentarian. The President may appoint an official Parliamentarian of the Association, who shall serve at the pleasure of the President.

Section 3. Taking of Votes at Annual Meeting of Members.

(a) ***The casting of votes at the Annual Meeting of Members shall be by showing of voting credentials, and shall be by paper ballots on a showing of voting credentials of one hundred members entitled to vote requesting such paper balloting or upon request of the chair.***

(b) ***Paper ballots at the Annual Meeting of Members shall be collected and immediately placed in custody of a certified public accountant who shall immediately count them and without unnecessary delay shall certify the result of the count to the Chair at the meeting, and the paper ballots shall thereafter be preserved by the accountant for 180 days, and thereafter the accountant shall deliver the ballots to the Secretary for preservation until the adjournment of the next Annual Meeting of Members and until such further times, if any, as decided by vote of the members or, to the extent not inconsistent therewith, by the President.***

ARTICLE XV

Amendments

Section 1. Amendments by the Board of Directors.

These Bylaws may be amended at any regular meeting of the Board of Directors by a majority vote, provided that the amendment has been submitted in writing at the previous regular meeting of said Board, or has been sent in writing by mail to every member of the Board listed in the most recent Official Directory not less than thirty days prior to the scheduled Board meeting. To qualify under this Section, the proposed amendment must

be recommended by the Bylaws & Resolutions Committee as printed in the Bylaws & Resolutions Committee report to the Board of Directors, or signed by at least two members of the Board of Directors or alternatively by two hundred fifty members of the Association entitled to vote.

Section 2. Germane Amendments.

Notice of specific amendments proposed shall not preclude amendments being made from the floor which are germane to the specifically proposed amendments.

Section 3. Amendments by Mail by the Membership.

(a) These Bylaws may be amended by mail in conjunction with the casting of ballots for the election of Directors by a majority vote of those members qualified to vote and voting by mail on the proposed Bylaws amendment. Proposals for changes to be made by mail may be recommended by the Board of Directors or by petition of members.

(b) Proposals for changes in the Bylaws to be made by mail may be submitted by petition of members and must be received by the Secretary of the Association no later than September 1st of the year prior to the mailing of the ballot in which the proposals to be voted upon will be included. Such petitions must bear the signatures, names, membership identification numbers and addresses of a number of members eligible to vote that is not less than 5% of the number of valid ballots cast in the most recent mail ballot election of directors, which number shall be provided by the Secretary to any member upon request. The petition may be accompanied by one supporting statement of not more than 500 words. Signatures on an amendment proposed by voting members must be handwritten, original

signatures, and all signatures must be sent by the same person (the "sponsor"). The petition shall clearly state that it may be withdrawn by the sponsor without notice to, or approval by, the signatories. The Board of Directors may prepare a statement of not more than 500 words in response to a proposal for change submitted by petition, and such statement must be received by the Secretary no later than October 1st.

(c) Proposals for changes in the Bylaws to be made by mail may be recommended by the Board of Directors at any meeting of the Board, provided that the proposed amendment has been recommended by the Bylaws & Resolutions Committee as printed in the Bylaws & Resolutions Committee report to the Board of Directors at the previous regular meeting of said Board, or signed by at least two members of the Board of Directors and either submitted in writing at the previous regular meeting of said Board, or sent in writing by mail to every member of the Board listed in the most recent "Official Directory" not less than forty-five days prior to the scheduled Board meeting. Such proposals may be accompanied by two statements, each not more than 500 words, one statement representing the majority view and the other representing the minority view of the Board, and must be received by the Secretary no later than October 1st of the year prior to the mailing of the ballot in which the proposals to be voted upon will be included.

(d) A rebuttal statement of not more than 250 words may be prepared by the persons who prepared the corresponding main statement and must be received by the Secretary no later than October 30th.

(e) The proposed changes together with the statements in support and opposition shall be published in the issue

of the "Official Journal" of the Association containing the ballot to elect Directors. Ballots for voting on changes in the Bylaws to be made pursuant to this section shall be mailed in accordance with the procedures established under Article VIII, Section 2(e), regarding ballots for election of Directors. The results of balloting conducted pursuant to this section shall be tabulated in accordance with the procedures established under Article VIII Section 2 (h), (i) and (j), to the extent applicable, shall be announced at the Annual Meeting of Members and shall be published in the "Official Journal" within 90 days after such announcement.

Section 4. Authority to Amend or Repeal.

Any Bylaw adopted by the Board may be amended or repealed either by the Board, or by the members by mail pursuant to Section 2 of this Article. Any Bylaw adopted by the members may be amended or repealed by the Board, unless it is adopted in bold face italics, in which case it may be amended or repealed only by the members, by mail, and not by the Board.

ARTICLE XVI

Amendments to the Certificate of Incorporation

Section 1. Recommendation by the Board of Directors.

(a) Amendments to the Certificate of Incorporation shall be recommended at any regular or special meeting of the Board of Directors by a majority affirmative vote of all Directors currently constituting the Board of Directors, provided that either (i) the amendment has been submitted in writing at the previous meeting of the Board of Directors, or (ii) has been sent in writing by mail

to every member of the Board of Directors as listed in the most recent Official Directory not less than forty-five (45) days prior to the scheduled Board of Directors meeting. To qualify for recommendation under this section, the proposal must be signed by not less than ten (10) members of the Board of Directors or Executive Council.

(b) No vote on amendments to the Certificate of Incorporation may be taken unless and until such proposals have been reviewed by outside legal counsel and the Board of Directors has been informed by such outside legal counsel of its opinion as to the legality, propriety, and efficacy of such proposal and its conformity with existing Bylaws and the Not-For-Profit Corporation Law of the state in which the Association is incorporated.

Section 2. Adoption by Members.

(a) Amendments to the Certificate of Incorporation proposed and recommended pursuant to Section 1 above, shall be presented to the members for adoption in conjunction with the casting of ballots for the election of Directors, and shall be approved by a majority affirmative vote of those members qualified to vote and voting by the directed voting procedure described herein at Article XVII. The proposed amendment must be received in writing by the Secretary by the first (1st) day of September of the year immediately preceding the mailing of the ballot in which the proposals to be voted on by directed vote will be included. Notice of any such recommended amendments timely received by the Secretary and the exact text of the recommended amendments to the Certificate of Incorporation to be voted upon by the membership by directed voting procedure shall be printed in the NRA Official Journal not less than forty-five (45) days, nor more than ninety (90) days before the mailing of the ballot in which the recommended proposals to be voted on by directed vote will be included.

Section 3. Publication of Notice.

Proposals and recommendations for changes to the Certificate of Incorporation may be accompanied

by two statements, each not more than 500 words, one statement representing the majority view of the Board of Directors, and the other representing the minority view of the Board of Directors, and must be received by the Association Secretary no later than October 1st (first) of the year preceding the mailing of the ballots in which the proposals to be voted on by directed vote will be included. The President shall designate persons from the Board of Directors to prepare such statements on behalf of the Board of Directors.

ARTICLE XVII

Directed Voting Procedures of Members

(a) The mail ballot voting procedure described in Article XV, Section 4 of these Bylaws is hereby defined as the Association's "Directed Voting Procedure." Votes of the membership by Directed Voting Procedure shall be termed "directed votes" and shall have the same force and effect as if such vote had been delivered by a member in person at a meeting. A directed vote shall not constitute a vote by proxy and shall not violate Article XII of these Bylaws.

(b) The Directed Voting Procedure shall be used by the membership to elect directors, amend the Bylaws, remove Association officials by recall, and amend the Certificate of Incorporation.

(c) Where any provisions of these Bylaws provides for a petition by the members, only original, handwritten signatures on such a petition shall be valid.

11250 Waples Mill Road
Fairfax, Virginia 22030-9400

CL1300051

EXHIBIT 2

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, **Plaintiff,** **v.** **ACKERMAN MCQUEEN, INC.,** **And** **MERCURY GROUP, INC.** **Defendants.**	**Case Nos. CL19001757** **CL19002067**

DECLARATION OF JOHN FRAZER

1. My name is John Frazer.

2. I am over the age of twenty-one years and am fully competent and able to testify as to the facts and statements contained herein, and am able to swear, and do hereby swear, that all of the facts and statements contained herein are true and correct to the best of my knowledge and that, except as expressly noted otherwise, I have personal knowledge of the same.

3. I am the Secretary and General Counsel of the Plaintiff National Rifle Association of America (the "NRA"). I have held these positions since 2015. In my capacity as Secretary and General Counsel, it is customary for me to interact with members of the NRA Board of Directors and attend Board of Directors' meetings and meetings of the NRA's governance-related committees, including its Legal Affairs Committees.

4. Prior to serving as Secretary and General Counsel, I held other positions with the NRA, including as director of Research and Information Division in the NRA's Institute for Legislative Action. In that capacity, I was actively involved in supporting NRA legal activities and routinely attended Board and committee meetings as described above.

5. During my tenure in these positions with the NRA, it has not been the practice of the NRA management to seek a Board vote, or other Board authorization or approval, in advance of commencing litigation. Since 2018 alone, several high-profile lawsuits were filed, prior to the above-captioned lawsuits, which were authorized solely by NRA management and not by the Board. After these lawsuits were filed, the Board received detailed briefings about their commencement and progress. The Board has also received detailed briefings about the above-captioned cases.

6. I declare under penalty of perjury that the foregoing is true and correct.

[redacted]

JOHN FRAZER

21 Misc.2d 571
Supreme Court, New York County, New York, Special Term, Part I.

BERMA MANAGEMENT CORP. and Milton L. Sloame, Plaintiffs,
v.
140 W. 42ND ST. REALTY, INC., Bernard Resnick, Abraham Chaite, Joseph Halpern, Lew Shulgasser and Oswald Besser, Defendants.

Feb. 29, 1960.

Synopsis

Action involving question of authority of plaintiff corporation's president to institute action in company's name and in its behalf. The Supreme Court, Special Term, Matthew M. Levy, J., held that under the circumstances the action was properly brought and maintained by the corporation.

Order in accordance with opinion.

West Headnotes (2)

[1] **Corporations and Business Organizations**
Conduct of litigation

Where by-laws provided that president should have management of business of corporation and contained no direct prohibition against president's institution of action in corporation's name and in its behalf, and majority of stockholders approved instant action brought by president in corporation's name and in its behalf, and directors were evenly divided and the question of the bringing and maintenance of instant action or of president's authority to do so had never been submitted to or passed upon at any meeting of board of directors or of the stockholders, president had authority to institute such action, notwithstanding that president knew that two of the four directors opposed the action and for that reason deliberately failed to call meeting to pass on question.

4 Cases that cite this headnote

[2] **Corporations and Business Organizations**
From customary duties or acts or nature of office

President has presumptive authority in discharge of his duties to prosecute suits in name of corporation.

Cases that cite this headnote

Attorneys and Law Firms

**18 *572 Geist, Netter & Marks, New York City (George E. Netter and Milton Waxenfeld, New York City, of counsel), for plaintiffs.

Frederick W. Beyer, Brooklyn, for defendants, 140 W. 42nd St. Realty, Inc., Resnick, Chaite, and Shulgasser.

Opinion

**19 MATTHEW M. LEVY, Justice.

[1] The sole question here is the authority of the plaintiff corporation's president to institute the action in the company's name and in its behalf. Both the motion and the cross motion raise that single issue.

The certificate of incorporation appears to be silent on the question, directly and indirectly. The only pertinent provisions of the by-laws of the corporation are:
'15. The business of this corporation shall be managed by its board of directors which may exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the certificate of incorporation or by these by-laws required to be exercised or done by the stockholders.

'29. The president shall be the executive officer of the corporation; he shall preside at all meetings of the stockholders and directors; he shall have the management of the business of the corporation and shall see that all orders and resolutions of the board are carried into effect.'

As I read these clauses I see no direct prohibition in them. The majority of the stockholders support the suit and the directors are evenly divided. But the question of the bringing and maintenance of this action or of the president's authority

to do so has never been submitted to or passed upon at any meeting of the board of directors or of the stockholders.

[2] In the circumstances, holding, as I do, that the president has presumptive authority in the discharge of his duties to prosecute suits in the name of the corporation, and there being no formal interdiction (cf. Kardwheel Corporation v. Karper, 1 Misc.2d 707, 148 N.Y.S.2d 132), this action is found to be properly brought and maintained by the plaintiff corporation.

West View Hills, Inc. v. Lizau Realty Corp., 6 N.Y.2d 344, 189 N.Y.S.2d 863; Matter of Paloma Frocks [Shamokin Sportswear Corporation], 3 N.Y.2d 572, 170 N.Y.S.2d 509, 65 A.L.R.2d 1317; Rothman & Schneider, Inc. v. Beckerman, 2 N.Y.2d 493, 161 N.Y.S.2d 118, 64 A.L.R.2d 895. The case of Sterling Industries v. Ball Bearing Pen Corp., 298 N.Y. 483, 84 N.E.2d 790, 10 A.L.R.2d 694, relied upon by the defendants, is clearly distinguishable, for there the president had asked the board for authority and the court treated the tie vote as a refusal which terminated the authority of the president.

The fact that the president in the instant case knew that two of the four directors opposed this action and deliberately failed to call a meeting to pass upon the question does not *573 preclude him from instituting the suit (West View Hills, Inc. v. Lizau Relty Corp., supra, 6 N.Y.2d 344, at page 349, 189 N.Y.S.2d 863, at page 866; **20 Matter of Paloma Frocks [Shamokin Sportswear Corporation], supra, 3 N.Y.2d 572, at page 575, 170 N.Y.S.2d 509, at page 511).

Accordingly, the motion of the applicant defendants for an order setting aside the service of the summons and complaint upon them, striking the appearance of the named law firm as attorneys for the plaintiff corporation, and enjoining them from continuing or prosecuting the action as attorneys for the plaintiff corporation is denied. The cross motion of the plaintiffs for an order striking the first affirmative defense alleged in the answer on the ground of insufficiency in law is granted. Settle order.

All Citations

21 Misc.2d 571, 197 N.Y.S.2d 18

End of Document

Exhibit 3

21 Misc.2d 571
Supreme Court, New York County, New York,
Special Term, Part I.

BERMA MANAGEMENT CORP.
and Milton L. Sloame, Plaintiffs,
v.
140 W. 42ND ST. REALTY, INC., Bernard Resnick, Abraham Chaite, Joseph Halpern, Lew Shulgasser and Oswald Besser, Defendants.

Feb. 29, 1960.

Synopsis

Action involving question of authority of plaintiff corporation's president to institute action in company's name and in its behalf. The Supreme Court, Special Term, Matthew M. Levy, J., held that under the circumstances the action was properly brought and maintained by the corporation.

Order in accordance with opinion.

West Headnotes (2)

[1] **Corporations and Business Organizations**
Conduct of litigation

Where by-laws provided that president should have management of business of corporation and contained no direct prohibition against president's institution of action in corporation's name and in its behalf, and majority of stockholders approved instant action brought by president in corporation's name and in its behalf, and directors were evenly divided and the question of the bringing and maintenance of instant action or of president's authority to do so had never been submitted to or passed upon at any meeting of board of directors or of the stockholders, president had authority to institute such action, notwithstanding that president knew that two of the four directors opposed the action and for that reason deliberately failed to call meeting to pass on question.

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President has presumptive authority in discharge of his duties to prosecute suits in name of corporation.

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Attorneys and Law Firms

**18 *572 Geist, Netter & Marks, New York City (George E. Netter and Milton Waxenfeld, New York City, of counsel), for plaintiffs.

Frederick W. Beyer, Brooklyn, for defendants, 140 W. 42nd St. Realty, Inc., Resnick, Chaite, and Shulgasser.

Opinion

**19 MATTHEW M. LEVY, Justice.

[1] The sole question here is the authority of the plaintiff corporation's president to institute the action in the company's name and in its behalf. Both the motion and the cross motion raise that single issue.

The certificate of incorporation appears to be silent on the question, directly and indirectly. The only pertinent provisions of the by-laws of the corporation are:
'15. The business of this corporation shall be managed by its board of directors which may exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the certificate of incorporation or by these by-laws required to be exercised or done by the stockholders.

'29. The president shall be the executive officer of the corporation; he shall preside at all meetings of the stockholders and directors; he shall have the management of the business of the corporation and shall see that all orders and resolutions of the board are carried into effect.'

As I read these clauses I see no direct prohibition in them. The majority of the stockholders support the suit and the directors are evenly divided. But the question of the bringing and maintenance of this action or of the president's authority

to do so has never been submitted to or passed upon at any meeting of the board of directors or of the stockholders.

[2] In the circumstances, holding, as I do, that the president has presumptive authority in the discharge of his duties to prosecute suits in the name of the corporation, and there being no formal interdiction (cf. Kardwheel Corporation v. Karper, 1 Misc.2d 707, 148 N.Y.S.2d 132), this action is found to be properly brought and maintained by the plaintiff corporation.

West View Hills, Inc. v. Lizau Realty Corp., 6 N.Y.2d 344, 189 N.Y.S.2d 863; Matter of Paloma Frocks [Shamokin Sportswear Corporation], 3 N.Y.2d 572, 170 N.Y.S.2d 509, 65 A.L.R.2d 1317; Rothman & Schneider, Inc. v. Beckerman, 2 N.Y.2d 493, 161 N.Y.S.2d 118, 64 A.L.R.2d 895. The case of Sterling Industries v. Ball Bearing Pen Corp., 298 N.Y. 483, 84 N.E.2d 790, 10 A.L.R.2d 694, relied upon by the defendants, is clearly distinguishable, for there the president had asked the board for authority and the court treated the tie vote as a refusal which terminated the authority of the president.

The fact that the president in the instant case knew that two of the four directors opposed this action and deliberately failed to call a meeting to pass upon the question does not *573 preclude him from instituting the suit (West View Hills, Inc. v. Lizau Relty Corp., supra, 6 N.Y.2d 344, at page 349, 189 N.Y.S.2d 863, at page 866; **20 Matter of Paloma Frocks [Shamokin Sportswear Corporation], supra, 3 N.Y.2d 572, at page 575, 170 N.Y.S.2d 509, at page 511).

Accordingly, the motion of the applicant defendants for an order setting aside the service of the summons and complaint upon them, striking the appearance of the named law firm as attorneys for the plaintiff corporation, and enjoining them from continuing or prosecuting the action as attorneys for the plaintiff corporation is denied. The cross motion of the plaintiffs for an order striking the first affirmative defense alleged in the answer on the ground of insufficiency in law is granted. Settle order.

All Citations

21 Misc.2d 571, 197 N.Y.S.2d 18

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Exhibit 4

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Swart v. Pawar, N.D.W.Va., November 19, 2015

63 Misc.2d 565
Supreme Court, Onondaga County, New York, Trial Term. .

CICERO INDUSTRIAL DEVELOPMENT CORPORATION and Joseph Vecchiarelli, Plaintiffs,
v.
Lee E. ROBERTS, Michael Georgianni, Pino Marzocchi and Serafino Marzocchi, Defendants.

July 1, 1970.

Synopsis

Action by corporation and its secretary-treasurer for specific performance of agreement between corporation and all its stockholders giving corporation first chance to buy a stockholder's shares at book value. The Supreme Court, Trial Term, Richard D. Simons, J., held that corporation could maintain the action.

Judgment granting specific performance.

West Headnotes (15)

[1] **Evidence**
Personal property in general

Agreement that each shareholder would not sell his stock until he had first offered to sell it to corporation at book value was clear and unambiguous and could not be varied orally.

1 Cases that cite this headnote

[2] **Corporations and Business Organizations**
From customary duties or acts or nature of office

There is presumptive power in president to institute litigation on behalf of corporation even in situations where he is outnumbered by other shareholders or directors, where suit is against corporate insiders, as opposed to outsiders, and where no emergency exists; such suits are authorized as necessary steps to preserve and protect corporate interests.

7 Cases that cite this headnote

[3] **Corporations and Business Organizations**
Conduct of litigation

Officers' right to sue to protect corporate interests may be rebutted by action of board of directors or by specific limitations in bylaws or articles of corporation.

Cases that cite this headnote

[4] **Corporations and Business Organizations**
Authority of directors

Power of board of directors is to be used to serve corporation's interests, not that of individual stockholders.

Cases that cite this headnote

[5] **Corporations and Business Organizations**
Liability for property and funds in general

A corporation has separate, independent legal rights; preservation of those rights ought to be one of highest aims to those entrusted with management of corporation.

Cases that cite this headnote

[6] **Corporations and Business Organizations**
Conduct of litigation

Absent express prohibition, appropriate officer may institute corporate action to protect corporation's assets without approval of board of directors and without necessity of resorting to derivative action with its drawbacks.

1 Cases that cite this headnote

[7] **Corporations and Business Organizations**
Conduct of litigation

If president is general manager of corporation, he has broad powers to sue under orthodox agency rules; he may also have such power as inherent incident of presidency; one assuming de facto

authority of president or general manager has similar authority; this is particularly permissible to preserve corporate assets or prevent factional disorder.

2 Cases that cite this headnote

[8] **Corporations and Business Organizations**
Persons entitled to sue; standing

Corporation could maintain action for specific performance of agreement between corporation and all its stockholders giving corporation first chance to buy a stockholder's shares at book value.

Cases that cite this headnote

[9] **Corporations and Business Organizations**
Restrictions and Agreements on Right to Transfer

Restrictions on sale of corporate stock are recognized by statute and effectuated by courts. Business Corporation Law § 514.

1 Cases that cite this headnote

[10] **Specific Performance**
Corporate stock or securities

Specific performance is available in appropriate case to enforce agreement between corporation and all its stockholders giving corporation first chance to buy a stockholder's shares at book value even when transfer to third party has been completed.

Cases that cite this headnote

[11] **Specific Performance**
Trial or hearing

In corporation's action for specific performance of agreement between corporation and all its stockholders giving corporation first chance to buy a stockholder's shares at book value, court's scope of inquiry was limited to testing reasonableness of price formula.

1 Cases that cite this headnote

[12] **Specific Performance**
Waiver and estoppel to urge objections to delay or of default

In action by corporation and its secretary-treasurer for specific performance of agreement between corporation and all its stockholders giving corporation first chance to buy a stockholder's shares at book value, evidence disclosed no waiver or estoppel against enforcement of sale restrictions.

Cases that cite this headnote

[13] **Estoppel**
Implied waiver and conduct constituting waiver

Estoppel
Intent

A "waiver" is intentional relinquishment of legal right; intention must be clearly established and cannot be inferred from doubtful or equivocal acts or language.

6 Cases that cite this headnote

[14] **Estoppel**
Estoppel by conduct

An "estoppel" arises when a person engages in conduct which is calculated to convey impression that facts are otherwise than and inconsistent with those which parties subsequently attempt to assert and which conduct is engaged in with intent or expectation that it will be acted upon by another.

1 Cases that cite this headnote

[15] **Estoppel**
Presumptions and burden of proof

Defendants claiming estoppel must prove their lack of knowledge of true facts, good faith on their part, reliance on plaintiff's conduct and action based on that reliance resulting in prejudice.

1 Cases that cite this headnote

Attorneys and Law Firms

****895** ***566** Hancock, Estabrook, Ryan, Shove & Hust, Syracuse, for plaintiffs; Donald J. Kemple, Syracuse, of counsel.

Crystal, Manes & Rifken, Syracuse, for defendants Marzocchi; Milton J. Crystal, Syracuse, of counsel.

DECISION

RICHARD D. SIMONS, Justice.

This action seeks specific performance of an agreement executed by the plaintiff corporation and all its shareholders. Plaintiffs seek to have it determined that the defendants must sell all of their stock to the plaintiff corporation or in the alternative, to the plaintiff Vecchiarelli and further that defendants be enjoined from selling any of the corporate assets or dissolving it pending transfer of the stock.

****896** Cicero Industrial Development Corporation was formed in 1968 for the purpose of buying real property in the Town of Clay, New York and developing it for industrial lease and sale. The original stockholders (and they remain the same today) are the plaintiff Vecchiarelli 30 shares, defendant Pino Marzocchi 15 shares, defendant Serafino Marzocchi 15 shares, defendant Roberts 30 shares, and defendant Georgianni 30 shares. Plaintiff Vecchiarelli is Secretary-Treasurer of the corporation.

At the time of incorporation, the shareholders signed the ***567** agreement involved in this litigation. It provides that no shareholder may sell shares of stock owned by him unless he first offers to sell his stock to the corporation at book value as defined in the agreement. The offer must be in writing and specify the number of shares offered and a copy of the written offer must also be sent to the other shareholders. The corporation has 30 days from the date of the offer to accept or reject part or all of the offer. If the corporation fails to accept the offer or rejects it, the selling shareholder is then deemed to offer the stock so rejected to the other shareholders who have 10 additional days in which to act. If the shares are not purchased by the corporation or the other shareholders, they may be sold to outsiders free of restriction.

Each shareholder, with the Marzocchis being considered as one, paid $100 a share for the stock. In addition, each shareholder invested loans up to $10,000 in the corporation.

In 1968, Cicero undertook construction of a building on its property for Fluidicon Corporation. Defendant Pino Marzocchi's construction men performed a portion of the work and he is a creditor of Cicero. There are also claims against him by Cicero of some claimed defects in the work. The building was substantially completed but Fluidicon went bankrupt and the building remained empty until General Electric Corporation leased it in 1969. During the period of its operation, the corporation acquired debts for legal fees, accounting services, construction work and so forth and there also remain mortgage liabilities for the construction of the Fluidicon Building and a purchase-money mortgage to the owner of the land. The corporation's income during its period of operation consisted of rent from General Electric, funds derived from the sale of a parcel of land to one Stevens and the sale of an easement to Niagara Mohawk Power Corporation.

The corporation's shareholders met frequently, but irregularly, throughout the entire period of its operation. There were never any minutes kept of the corporate meetings and the evidence of what transpired as to all of these meetings is necessarily dependent upon recollection of oral conversations. First and foremost at most of the meetings was the question of how to solve the company's financial difficulties. The remedies suggested included refinancing, sale proposals to various ****897** interested parties, including Taft Industrial Park, Inc., an adjacent land owner.

It is the position of the plaintiff Vecchiarelli that he participated in all of these meetings in an effort to resolve financial difficulties of the corporation, but that his position was constant, ***568** that he wished to keep his stock and that if he were financially able, to purchase the defendants' stock. During most of this period, he was unable to buy but as of late February or early March, 1970 he secured loans sufficient to purchase the stock at a price comparable to Taft's and demanded that the remaining shareholders sell to the corporation or him according to the shareholders' agreement.

It is conceded by the defendants that all of them signed agreements to sell their stock to Taft Industrial Park, Inc. and some of them also agreed to sell to other outside purchasers. It is admitted that these attempts to sell were done without complying with the literal terms of the contract and that no offer was over made to the corporation's stockholders or to Vecchiarelli (although Marzocchi claims that he orally offered

the stock to Vecchiarelli and that Vecchiarelli said he was unable to purchase it). In any event, no offer was ever made in writing to either of the plaintiffs.

[1] It is the argument of the defendants that the contract is void and was executed under a mutual mistake of fact in that none of the signers realized that they might be compelled to sell their stock at book value. The contract is clear and unambiguous in this respect and cannot be varied orally. It is also clear that the parties understood their mutual obligations throughout but defendants did not offer to sell because the corporation was insolvent. Defendants thought Vecchiarelli was unable to buy and necessarily would sell his stock also.

Defendants contend that the corporation may not maintain this action, that Vecchiarelli is the real party in interest, that the corporation is insolvent and unable to perform and that the agreement setting a book value repurchase price is unconscionable and unenforceable.

The corporation is suing persons owning 75% Of its stock and a majority of its Board of Directors, including its President and Vice-President, at the instance of its Secretary-Treasurer, plaintiff Vecchiarelli, owner of 25% Of the stock.

Nothing called to the court's attention indicates that the certificate of incorporation or the by-laws of the corporation either authorize or prohibit institution of a suit on behalf of the corporation by an officer.

[2] [3] [4] There is presumptive power in a president to institute litigation on behalf of the corporation even in situations where he is outnumbered by other shareholders or directors, where the suit is against corporate insiders, as opposed to outsiders, and where no emergency exists. **898

(West View Hills, Inc. v. Lizau Realty Corporation, 6 N.Y.2d 344, 189 N.Y.S.2d 863, 160 N.E.2d 622; *569 Paloma Frocks Incorporated (Shamokin), 3 N.Y.2d 572, 170 N.Y.S.2d 509, 147 N.E.2d 779; 46 Cornell Law Quarterly 159.) Such suits are authorized as necessary steps to preserve and protect the corporate interests. The officers' right to sue may be rebutted by action of the Board of Directors or by specific limitations in the by-laws or articles of the corporation, Sterling Industries, Inc. v. Ball Bearing Pen Corporation, 298 N.Y. 483, 84 N.E.2d 790, and presumably, the Board of Directors could subsequently demand withdrawal of the suit by appropriate action. But the power of the Board is to be used to serve the corporation's interests, not that of the individual stockholders. (Glenmark, Inc. v. Carity, 38 Misc.2d 980, 239 N.Y.S.2d 440.)

[5] [6] A corporation has separate, independent legal rights. (West View Hills, Inc. v. Lizau Realty Corporation, supra.) The preservation of those rights ought to be one of the highest aims to those entrusted with management of the corporation. In this instance, the corporation's rights specifically included stock repurchase options under the stockholders' agreement to preserve the corporate integrity. The intention of the defendants here is to consummate a sale of stock in direct contradiction of the shareholders' agreement. Absent express prohibition, an appropriate officer may institute corporate action to protect the corporation's assets without Board approval and without the necessity of resorting to a derivative action with its drawbacks. (37 St. John's Law Review 29, The Authority of the President over Corporate Litigation: A Study in Inherent Agency by Roger J. Goebel, at pages 78—79.)

[7] If the president is the general manage of the corporation, there is little doubt that he has broad powers to sue under orthodox agency rules. He may also have such power as an inherent incident of the presidency. (37 St. John's Law Review 29.) It has been held that one assuming de facto the authority of the president or general manager has similar authority.

(Rothman & Schneider, Inc. v. Beckerman, 2 N.Y.2d 493, 161 N.Y.S.2d 118, 141 N.E.2d 610.) This is particularly permissible to preserve corporate assets or prevent factional disorder. (37 St. John's Law Review, ibid., pp. 50—51.)

It is clear that the day to day operation of the corporation was the responsibility of plaintiff Vecchiarelli. He hired attorneys, negotiated contracts and leases and handled its affairs. The defendants themselves recognized his managerial efforts by conceding that he was entitled to more money than they were for his equal share of stock because of the time and effort he had expended in operating the business. Meetings were frequent in respect to sale of the property. Those meetings were not concerned primarily with the day to day management of the business. They were centered primarily on the interest *570 of the defendants in **899 withdrawing from the corporation to salvage an investment and not to preserve the corporation or further its interests. Thus, the stockholders' meeting called for March 17, 1970 and enjoined by this court sought as its purposes to dissolve the corporation and sell all its assets to Taft by 2/3 vote of the stock. It was an attempt to circumvent the shareholders' agreement at a time when the corporation or Vecchiarelli was able to exercise rights granted under the shareholders' agreement, and at a time

when at least one of the defendants held a financial interest in Taft.

[8] The corporation may maintain the action.

[9] [10] [11] Restrictions on the sale of corporate stock are recognized by statute, Business Corporation Law s 514, and effectuated by the courts, Allen v. Biltmore Tissue Corporation, 2 N.Y.2d 534, 161 N.Y.S.2d 418, 141 N.E.2d 812; 7 Buffalo Law Review, 103. Specific performance is available in an appropriate case to enforce such agreements even when the transfer to the third party has been completed. (Tomoser v. Kamphausen, 307 N.Y. 797, 121 N.E.2d 622; Oppenheim Collins & Company v. Beir, 187 Misc. 428, 64 N.Y.S.2d 19.) Since determination of the price for repurchase is a contractual matter voluntarily agreed upon by the parties, the court's scope of inquiry is limited to testing the reasonableness of the price formula. (Allen v. Biltmore Tissue Corporation, supra.) Book value prices have consistently been approved by the courts. (Allen v. Biltmore Tissue Corporation, supra; Aron v. Gillman, 309 N.Y. 157, 128 N.E.2d 284; Claire v. Wigdor, 24 A.D.2d 992, 266 N.Y.S.2d 6, aff'd 18 N.Y.2d 687, 273 N.Y.S.2d 437, 219 N.E.2d 883.)

The corporation has no funds to purchase this stock (unless Vecchiarelli is to loan them the money he has borrowed). It is a reasonably safe assumption that this stock will be bought by Vecchiarelli after the corporation rejects it because of the solvency requirements of Business Corporation Law, s 513. Possibly at the 'time of performance', the corporation may be able to buy. (Business Corporation Law, s 514(b).)

Even if it cannot, that is no impediment to the maintenance of this action. The corporation has a right to demand performance, the offer to be accepted by it if it can perform, or by remaining stockholder if it cannot.

[12] It is claimed by the defendants that the plaintiff Vecchiarelli, by his own actions, waived enforcement of the sale restrictions and is now estopped. His actions could not result in a waiver or estoppel of the corporation's rights under the circumstances here. Nor did his acts result in a waiver or estoppel of his own rights.

*571 [13] A waiver is an intentional relinquishment of a legal right. (21 N.Y.Jur., Estoppel, s 66.) The intention must be clearly established **900 and cannot be inferred from doubtful or equivocal acts or language. Participation in meetings when various alternatives of sale, refinancing or repurchase were discussed and the negotiations with prospective purchasers were not sufficient to infer a waiver. The corporation was financially troubled. Various forms of relief were discussed but the need for unanimity was always understood by the shareholders and Vecchiarelli's desire to continue in the corporation was expressed on more than one occasion. In addition, the shareholders' agreement requires any amendment of the agreement to be in writing.

[14] [15] An estoppel differs from a waiver. An estoppel arises when a person engages in conduct which is calculated to convey the impression that the facts are otherwise than and inconsistent with those which the parties subsequently attempt to assert and which conduct is engaged in with the intent of expectation that it will be acted upon by another. (21 N.Y.Jur., Estoppel, s 21.) Defendants claiming an estoppel must prove their lack of knowledge of the true facts, good faith on their part, reliance on the conduct of Vecchiarelli and action based on that reliance resulting in prejudice. (21 N.Y.Jur., Estoppel, s 60.) There was no fraud or misrepresentation upon Vecchiarelli's part. The fact that he offered to sell at a price which was not accepted and later, when financing was available, changed his mind, does not create an estoppel. The defendants were aware of his wishes. They hoped he would join them and not insist on enforcing the agreement. But it was always apparent to everyone that Vecchiarelli's position was not fixed or certain. He insisted that if he was to sell he must receive more money than was offered the others. Defendants agreed with him and proceeded on their own, leaving it to Vecchiarelli to negotiate his own sale price. The contracts which defendants signed with Taft were contingent upon Taft acquiring Vecchiarelli's stock and clear recognition of his rights. (Bullock v. Cutting, 155 App.Div. 825, 829, 140 N.Y.S. 686, 689.) Defendants have not lost anything by his conduct except a hope of sale which was always conditioned on prior rights of the corporation and Vecchiarelli.

Judgment is granted to plaintiffs for specific performance of the shareholders' agreement. The order enjoining the stockholders meeting of March 17, 1970 is continued for 40 days from the date of the signing of an appropriate order herein together with service of a copy of the order and notice of entry on the non-defaulting defendants.

All Citations

63 Misc.2d 565, 312 N.Y.S.2d 893

End of Document

Exhibit 5

71 A.D.3d 598, 899 N.Y.S.2d
154, 2010 N.Y. Slip Op. 02662

****1** Family M. Foundation Ltd., Respondent
v
Ninotchka Manus, Appellant, et al., Defendant.

Supreme Court, Appellate Division,
First Department, New York
March 30, 2010

CITE TITLE AS: Family M. Found. Ltd. v Manus

HEADNOTE

Corporations
Officers and Directors
Authority to Prosecute Lawsuits

Morton S. Minsley, New York, for appellant.
Davidoff Mallito & Hutcher LLP, New York (Ralph E. Preite of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 20, 2009, which, in an action to recover a loan, denied defendant-appellant's motion for relief from a prior order, same court and Justice, entered July 1, 2004, which had, inter alia, granted plaintiff's motion to enforce a stipulation of settlement, unanimously affirmed, with costs.

As the motion court had already explained in granting plaintiff's motion to enforce the stipulation of settlement, the action is properly maintained by plaintiff corporation under the authority of its president and sole director, Elizabeth (Libby) Manus, and it is "inconsequential" whether she is the owner of all of plaintiff's shares, as she represented on plaintiff's motion to enforce the stipulation, or one third of its shares, as defendant claimed in opposing such motion, or none of its shares, as ***599** defendant presently claims on the basis of purportedly new evidence. A corporation's president has presumptive authority to act on behalf of the corporation, including the authority to prosecute and defend lawsuits (*see* *West View Hills v Lizau Realty Corp.*, 6 NY2d 344 [1959]; *Executive Leasing Co. v Leder*, 191 AD2d 199, 200 [1993]). This is not a case where one 50% shareholder seeks to assert a claim on behalf of the corporation against another 50% shareholder who possesses an equal degree of control, or where the president is acting in contravention of a board of director's vote (*see e.g. Executive Leasing*). Defendant's new claims that the corporation was dissolved by operation of the laws of the Cayman Islands, and that Libby's status as plaintiff's president has never been conceded and is fairly disputable, ****2** are either untimely raised (*see* CPLR 2221 [e] [3]), speculative, based on hearsay, or otherwise insufficiently substantiated to warrant relief from the July 1, 2004 order. Concur—Mazzarelli, J.P., Sweeny, Nardelli, Acosta and Manzanet-Daniels, JJ.

End of Document

Exhibit 6

KeyCite Yellow Flag - Negative Treatment
Distinguished by T.F. James Co. v. Vakoch, N.D., June 8, 2001
376 N.W.2d 43
Supreme Court of North Dakota.

FARMERS UNION OIL COMPANY OF NEW ENGLAND, a cooperative, Plaintiff and Appellee,
v.
William S. MAIXNER, Defendant and Appellant,
Lew Spears and New England Agri-Services, Inc., Defendants.

Civ. No. 10943.
|
Oct. 29, 1985.

Synopsis

Oil company brought action on overdue account against agricultural products company and president and principal stockholder thereof as personal guarantor. Agricultural products company did not answer or appear and default judgment was entered against it. The District Court, Hettinger County, Southwest Judicial District, Lyle G. Stuart, J., entered judgment against personal guarantor and awarded oil company attorneys' fees, and personal guarantor appealed. The Supreme Court, Erickstad, C.J., held that: (1) oil company's agreement to forbear bringing suit in return for personal guarantee constituted good consideration; (2) trial court had to determine whether the two month forbearance constituted reasonable consideration; and (3) award of attorneys' fees was improper.

Reversed in part and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (11)

[1] **Contracts**
Presumptions and burden of proof

Written instrument is presumptive evidence that there was consideration for written instrument, and burden of proving lack of consideration lies with party seeking to avoid instrument. NDCC 9–05–10, 9–05–11.

3 Cases that cite this headnote

[2] **Contracts**
Forbearance

Refraining from doing something which one has a legal right to do constitutes good consideration.

5 Cases that cite this headnote

[3] **Guaranty**
Forbearance

Oil company's agreement to forbear from bringing lawsuit against agricultural supply company in return for personal guarantee of principal stockholder and president of company, as explicitly set forth in personal guarantee, constituted good consideration, though board of directors of oil company had not formally decided to institute lawsuit before signing of guarantee. NDCC 9–05–01.

2 Cases that cite this headnote

[4] **Corporations and Business Organizations**
Persons entitled to question authority

Officer of agricultural products company being sued by oil company on personal guarantee could not object to any lack of authority to bring suit on part of oil company's officer, where oil company made no such objection.

5 Cases that cite this headnote

[5] **Guaranty**
Offer and acceptance in general

Acceptance of personal guarantee by chairman of board of directors of oil company, after execution by personal guarantor in chairman's presence, constituted acceptance by oil company.

Cases that cite this headnote

[6] **Guaranty**
Forbearance

When a consideration for guaranty consists of forbearance from suit, but an exact period

of time for said forbearance is not stated, it will be inferred from surrounding circumstances that forbearance should be for "reasonable time," and if surrounding circumstances indicate that forbearance has not been for reasonable time, then there is failure of consideration and guarantor is discharged from liability.

Cases that cite this headnote

[7] **Appeal and Error**

Asserting invalidity of contract or other instrument

Question whether forbearance was for reasonable time to constitute adequate consideration for guaranty could be considered on appeal, though personal guarantor did not raise specific question at trial court level, where new argument was based on same general defense of lack of consideration, which was raised, and in light of confusion between lack of consideration and failure of consideration.

3 Cases that cite this headnote

[8] **Guaranty**

Questions for jury

The determination of what constitutes a reasonable time of forbearance in order to be considered adequate consideration for purposes of personal guaranty is a question of fact to be determined by trier of fact.

Cases that cite this headnote

[9] **Guaranty**

Forbearance

Forbearance should be for reasonable time in order to constitute adequate consideration for personal guaranty, when intent of parties concerning time of forbearance cannot be determined from personal guaranty alone.

Cases that cite this headnote

[10] **Costs**

Contracts

Attorneys' fees can be awarded if agreed by parties, either expressly or impliedly, but such agreement is limited by NDCC 28–26–04, which provides that attorney's fees provisions in certain debt instruments is against public policy and void.

10 Cases that cite this headnote

[11] **Costs**

Contracts

Personal guaranty of debt on open account was document relating to payment of debt, and therefore, award of attorneys' fees to creditor in action on guaranty violated NDCC 28–26–04, which declares to be against public policy any provision for attorney fees in an evidence of debt.

6 Cases that cite this headnote

Attorneys and Law Firms

*45 James D. Gion, Regent, for plaintiff and appellee.

Freed, Dynes, Reichert & Buresh, Drawer K, Dickinson, for defendant and appellant; argued by Ronald A. Reichert.

Opinion

ERICKSTAD, Chief Justice.

William S. Maixner appeals from the judgment of the District Court of Hettinger County, awarding Farmers Union Oil Company of New England (Farmers Union) damages of $22,036.78 plus interest and costs, and reasonable attorney's fees in the sum of $750.00.

The Defendant, William S. Maixner, is the principal stockholder and president of New England Agri-Services, Inc. (Agri-Services). Agri-Services is in the business of selling chemicals, feed, seed, and various other products along with performing related services for its customers. Most of the chemicals were purchased from Farmers Union on an open account and sold on the retail level. Agri-Services' account with Farmers Union became overdue and delinquent in the amount of $22,036.78.

On December 17, 1983, after the account had been outstanding for 14 months, Maixner executed and delivered to Eldon Kaufman, the chairman of the Board of Directors of Farmers Union, a document entitled PERSONAL GUARANTEE. The document was prepared by Farmers Union's attorney and read as follows:

"PERSONAL GUARANTEE

"The undersigned does represent to Farmers Union Oil Company of New England that he is one of the principals or owners in the business organization known as Agri-Business, Inc. Further, in consideration of the forbearance of Farmers Union Oil Company of New England from bringing suit on the account of that business organization at this time, the undersigned does personally and individually guarantee payment of all payments due upon the business credit account with Farmers Union Oil Company of New England, together with payment of any and all expenses incurred by creditors as a result of non-payment of said credit account when due.

"Dated this 17 day of December, 1983.
/s/ William S. Maixner

Individual Guarantor
New England, N.D.

Residence Address"

The trial court found there was no credible evidence of fraud or duress and that Maixner signed and delivered the guarantee of his own free will. Maixner testified that he read the guarantee. He made no objection or comments about the guarantee and asked no questions. No explanation of the guarantee was made by Kaufman and there was no discussion concerning a possible lawsuit.

On February 17, 1984, two months after the signing of the guarantee, a Summons and Complaint was served, asking for judgment against Maixner and Agri-Services, jointly and severally, for the sum of $22,036.78, the amount due on Agri-Services account, plus costs, attorneys' fees and disbursements. The case was tried without a jury September 13, 1984. Agri-Services did not answer or appear and as such judgment by default was entered against Agri-Services for the amount sued in the complaint. On December 21, 1984, judgment was entered against Maixner in the amount of $22,036.78 plus interest and costs. Farmers Union was also awarded reasonable attorneys' fees in the sum of $750.00.

There are two basic issues raised on appeal. The first one involves the concepts of lack of consideration, failure of consideration, forbearance to sue and the reasonableness ***46** of the time of forbearance. The second one involves the propriety of the allowance of attorneys' fees.

I

[1] A written instrument is presumptive evidence that there was consideration for the written instrument. Section 9–05–10, N.D.C.C.; *Mid-America Real Estate & Inv. Corp. v. Lund,* 353 N.W.2d 286, 290 (N.D.1984); *Farmers & Merchants National Bank of Hatton v. Lee,* 333 N.W.2d 792, 794 (N.D.1983). The burden of proving lack of consideration lies with the party seeking to avoid the instrument. Section 9–05–11, N.D.C.C.; *Mid-America Real Estate,* 353 N.W.2d at 290; *Farmers & Merchants National Bank of Hatton,* 333 N.W.2d at 794. In light of these rules Maixner makes two arguments in challenging the trial court's conclusion that there was adequate consideration on the part of Farmers Union.

A.

First, Maixner alleges that Farmers Union did not forbear instituting a lawsuit against Agri-Services and therefore did not give any consideration for Maixner's guarantee. Maixner supports this argument by interpreting the facts to support his claim that the Board of Directors had the responsibility of instituting lawsuits; that the Board of Directors did not make the decision to initiate this lawsuit; that the members of the Board of Directors did not discuss the possibility of initiating a lawsuit relevant to the signing of the guarantee; and that Kaufman had no authority to institute this lawsuit but did so without the knowledge or approval of the Board of Directors.

[2] **[3]** The crux of Maixner's argument is the assumption that the Farmers Union Board of Directors did not formally agree to institute a lawsuit before the signing of the guarantee. It is argued that without a formal agreement to institute a lawsuit Farmers Union could not have forborn instituting a lawsuit and thus gave no consideration. This argument, however, misinterprets the requirements of consideration.

Refraining from doing something which one has a legal right to do constitutes good consideration. *Gulden v. Sloan,* 311 N.W.2d 568, 572 (N.D.1981). It is not necessary that Farmers Union had actually decided to institute a lawsuit and then agreed to forbear taking such action on account of the guarantee. All that is necessary is proof that Farmers Union gave up its right to institute a lawsuit against Agri-Services in exchange for the guarantee by Maixner. *Gulden,* 311 N.W.2d at 572; *Pioneer Credit Co. v. Medalen,* 326 N.W.2d 717, 719 (N.D.1982); *Divide County v. Citizens' State Bank of Ambrose,* 52 N.D. 29, 201 N.W. 693, 694 (N.D.1924); Section 9–05–01, N.D.C.C. The personal guarantee specifically states that Farmers Union will forbear from bringing suit. We thus conclude that there was an agreement to forbear from bringing a lawsuit and that forbearance from bringing suit can constitute good consideration.

[4] Maixner has questioned the authority of Kaufman to initiate a lawsuit on behalf of Farmers Union. Whether or not Kaufman had actual authority to initiate a lawsuit is unimportant as Maixner cannot object to Kaufman's alleged lack of authority. As a general rule, if a corporation does not object to an officer's lack of authority, a third person may not object. *Village of Brown Deer v. City of Milwaukee,* 16 Wis.2d 206, 114 N.W.2d 493, 497 (1962). Farmers Union did not object to any lack of authority on the part of Kaufman; therefore, Maixner may not do so.

[5] Maixner also argues that the guarantee is ineffective because Farmers Union did not accept the guarantee. In our view the acceptance of the guarantee by the chairman of the Board of Directors of Farmers Union, after execution of the guarantee by Maixner in the chairman's presence, constitutes acceptance by Farmers Union.

B.

[6] Maixner next argues that he did not receive adequate consideration because *47 Farmers Union did not forbear from bringing suit for a reasonable period of time. The personal guarantee does not provide a specific time period during which Farmers Union will forbear from bringing suit. It merely states that Farmers Union will not bring suit "at this time." This seems to be more of a *failure of consideration* argument, to wit: Farmers Union failed to forbear bringing suit for a reasonable time, rather than a *lack of* consideration argument, to wit: the guarantee *lacked consideration* at the time of execution of the guarantee agreement. We have said that the determination that consideration has failed is a question of fact. *First National Bank of Belfield v. Burich,* 367 N.W.2d 148, 152 (N.D.1985). We also said in *Burich:*

> "3. *Failure of consideration should be distinguished from lack of consideration. When there is a lack of consideration no contract is ever formed. Harrington v. Harrington,* 365 N.W.2d 552 (N.D.1985). When there is a failure of consideration, a contract, valid when formed, becomes unenforceable because the performance bargained for has not been rendered. *Franklin v. Carpenter,* 309 Minn. 419, 244 N.W.2d 492 (1976). See also, 1 Williston, Contracts, §§ 119A (3d ed.); 1 Corbin, Contracts, § 133."

Both parties acknowledge that "[a]n agreement to forbear need not be in express terms or for an exact period of time." *First National Bank of Red Bud v. Chapman,* 51 Ill.App.3d 738, 9 Ill.Dec. 426, 430, 366 N.E.2d 937, 941 (1977); *Baker v. Citizens State Bank of St. Louis Park,* 349 N.W.2d 552, 559 (Minn.1984). When an exact period of time is not stated, it will be inferred from the surrounding circumstances that the forbearance should be for a "reasonable time." *Chapman,* 9 Ill.Dec. at 430, 336 N.E.2d at 941. If the surrounding circumstances indicate that the forbearance has not been for a reasonable time, then there is a failure of consideration and the guarantor is discharged from liability. *Baker,* 349 N.W.2d at 559.

The question which must be resolved is whether or not Farmers Union's forbearance from bringing suit for two months is a reasonable time and thus not a failure of consideration. This issue of the reasonableness of the time of forbearance is a question of first impression in North Dakota. [1]

[7] While Farmers Union briefly discussed the issue of reasonable time of forbearance at the trial level and in its brief, Maixner did not raise this specific question until his reply brief. Therefore, we are faced with the preliminary question of whether or not it is appropriate for us to

review this issue. We recognize the ample authority that generally a party may not raise an issue for the first time on appeal. *Andersen v. Teamsters Local 116 Building Club, Inc.*, 347 N.W.2d 309, 313 (N.D.1984); *Towne v. Sautter*, 326 N.W.2d 694, 697 (N.D.1982); *Allen v. Kleven*, 306 N.W.2d 629, 633 (N.D.1981); *Moran v. Moran*, 200 N.W.2d 263, 270 (N.D.1972). However, in this case the new argument raised is based upon the same general defense that was raised in the lower court; that is the defense of lack of consideration. In the lower court, Maixner's defense of lack of consideration was based upon his contention that there was no forbearance on behalf of Farmer's Union. On appeal, Maixner seems to have broadened his argument to assert that if the guarantee provided for consideration at the time of its execution, Farmers Union failed to perform by not forbearing a reasonable period of time and thus, the consideration became inadequate. The lower court in essence merely ***48** ruled that as the guarantee contained a provision obligating Farmers Union to forbear bringing suit against Agri-Services in exchange for Maixner's personal guarantee, consideration existed for the guarantee. In effect on appeal Maixner makes two different consideration arguments, (1) the guarantee on its face lacks consideration,[2] (2) Farmers Union failed to perform by not forbearing a reasonable time and thus the consideration became inadequate (consideration failed).

We will consider this aspect of consideration on appeal because of the confusion which exists between lack of consideration and failure of consideration, notwithstanding that the trial court may not have been fairly apprized of the latter issue.

[8] **[9]** In the case before this Court, it cannot be determined from the personal guarantee what period of time the parties intended when it was agreed that Farmers Union would forbear from bringing suit "at this time." When the intent of the parties concerning time of forbearance cannot be determined from the personal guarantee alone, forbearance should be for a reasonable time. What constitutes a reasonable time within the facts of a given case is a question of fact to be determined by the trier of fact. In at least two cases, not involving the issue of the reasonableness of time of forbearance but cases involving the issue of reasonableness of time, we have said such an issue is a question of fact. *Keller v. Hummel*, 334 N.W.2d 200, 203 (N.D.1983); *Mott Equity Elevator v. Svihovec*, 236 N.W.2d 900, 907 (N.D.1975). Applying that rule, we remand this case to the trial court to determine as a question of fact if, under the facts of this case, two months was a reasonable time of forbearance, or if bringing suit within two months of the execution of the guarantee constituted a failure of consideration.

II.

The next issue for this Court to address is whether or not it was proper to award Farmers Union reasonable attorney's fees of $750.00. Maixner argues that the awarding of attorneys' fees is improper as it is against public policy according to Section 28–26–04, N.D.C.C. Farmers Union contends that Section 28–26–04 does not apply in this case and that the awarding of attorneys' fees was proper according to Section 28–26–01, N.D.C.C. The trial court gave no specific legal basis for its decision to award attorneys' fees. The trial record strongly suggests, and it is agreed by both parties, that the only basis for awarding attorneys' fees is the guarantee signed by Maixner. The relevant part of this document states that, "the undersigned does personally and individually guarantee ... payment of any and all expenses incurred by creditors as a result of non-payment of said credit account when due."

[10] **[11]** "The general rule in North Dakota is that in the absence of any contractual or statutory liability, attorneys' fees incurred by a plaintiff in the litigation of his claim are not recoverable as an item of damages, either in an action ex contractu or an action ex delicto." *Hoge v. Burleigh County Water Management District*, 311 N.W.2d 23, 31 (N.D.1981). *See also, Baldus v. Mattern*, 93 N.W.2d 144 (N.D.1958); Section 28–26–01(1), N.D.C.C. The reason for this rule is that attorneys' fees are not a legitimate consequence of the tort or breach of contract; to allow these expenses to a successful plaintiff but not to a successful defendant would give one an unfair advantage. *Hoge*, 311 N.W.2d at 31; *Baldus*, 93 N.W.2d at 149. Although attorneys' fees can be awarded if agreed by the parties, either expressly or impliedly, such an agreement is limited by Section 28–26–04. Farmers Union cites *Hoge* in support of its contention that the awarding of attorneys' fees was proper in this case. In ***49** *Hoge*, we affirmed the lower court's award of attorneys' fees because it had been impliedly agreed by the parties in an indemnity agreement. *Hoge*, however, is distinguishable from the case now before our Court. The decision in *Hoge* was based on Section 28–26–01(1), N.D.C.C., while the present case is controlled by Section 28–26–04, N.D.C.C. Section 28–26–04 specifies:

> "Any provision contained in any note, bond, mortgage, security agreement, *or other evidence of debt* for the payment of an attorney's fee in case of default in payment or in proceedings had to collect such note, bond, or evidence of debt, or to foreclose such mortgage or security agreement, is against public policy and void." [Emphasis added.]

"Other evidence of debt" includes the personal guarantee agreement at issue in this case because the guarantee relates to the payment of debt. As the attorneys' fees were awarded because of the personal guarantee, and as the personal guarantee is a document relating to the payment of a debt, the attorneys' fees were awarded in violation of Section 28–26–04, N.D.C.C. The indemnity agreement in *Hoge,* on the other hand, did not relate to the payment of a debt and as such was not controlled by Section 28–26–04. We thus hold that the awarding of attorneys' fees of $750.00 to Farmers Union was improper, and that the part of the judgment awarding the attorneys' fees is reversed.

The part of the judgment awarding damages is remanded to the trial court to determine if, under the facts of this case, two months was a reasonable time of forbearance, or if bringing the suit within two months constituted a failure of consideration. The part of the judgment awarding attorneys' fees is reversed. The case is accordingly reversed in part and remanded for further proceedings pursuant to this opinion.

GIERKE, VANDEWALLE, MESCHKE and LEVINE, JJ., concur.

All Citations

376 N.W.2d 43

Footnotes

1 While the question of what constitutes a reasonable time of forbearance on a personal guarantee that is indefinite as to time is a question of first impression in North Dakota, several other courts have discussed this issue. *Baker v. Citizens State Bank of St. Louis Park,* 349 N.W.2d 552 (Minn.1984); *Sheraton Service Corporation v. Kanovos,* 4 Mass.App. 851, 357 N.E.2d 20 (1976); *Mintz v. Hornblower & Weeks,* 83 F.2d 32 (6th Cir.1936); *Citizens Sav. Bank & Trust Co. v. Babbitt's Estate,* 71 Vt. 182, 44 A. 71 (1899).

2 We have disposed of the first "consideration" issue earlier herein on the basis that the determination of lack of consideration is generally considered a question of law for the court to decide. *Gulden v. Sloan,* 311 N.W.2d 568, 572 (N.D.1981); *Kuhn v. Kuhn,* 281 N.W.2d 230, 235 (N.D.1979).

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Exhibit 7

93 A.D.3d 440, 941 N.Y.S.2d
36, 2012 N.Y. Slip Op. 01633

**1 William Fernandez et al., Respondents
v
Richard Hencke, Appellant.

Supreme Court, Appellate Division,
First Department, New York
March 6, 2012

CITE TITLE AS: Fernandez v Hencke

HEADNOTES

Corporations
Capacity to Sue

Joint Ventures
Breach of Joint Venture Agreement
Failed Joint Venture—Recovery of Advances Paid to Shareholder

D'Errico Dreeben, LLP, Garden City (Frank N. D'Errico of counsel), for appellant.
Rappaport, Hertz, Cherson & Rosenthal, P.C., Forest Hills (Jeffrey M. Steinitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 7, 2011, after a nonjury trial, awarding the principal amount of $80,064.54 to plaintiff El Viajero Corp., unanimously affirmed, with costs. *441

Defendant Richard Hencke, plaintiff William Fernandez, and a third person not a party to this action formed plaintiff corporation for the purpose of opening a restaurant. During the construction phase of the restaurant, Fernandez permitted defendant to draw advances from the corporation's account against ""future profits and salaries." The restaurant never opened and its assets were sold for $200,000.

After the failed joint venture, Fernandez, who had funded the corporation, and the corporation commenced this action against defendant, seeking to recover the advances defendant had drawn, totaling $80,064.54. Neither Fernandez nor the other individual, both of whom were equal shareholders with defendant, had gained any profits from the failed venture or taken any salary from the corporation.

Defendant's argument that the corporation could not properly bring a lawsuit against him because there was no corporate resolution authorizing such an action has been waived since it is an affirmative defense that defendant did not raise until after the trial (*see* CPLR 3018 [b]). In any event, it lacks merit. Where there is no direct prohibition by the board, the president of a corporation has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation (*Rothman & Schneider v Beckerman*, 2 NY2d 493, 497 [1957]; *Family M. Found. Ltd. v Manus*, 71 AD3d 598 [2010], *lv dismissed* 15 NY3d 819 [2010]).

The evidence establishes that both parties intended the advances to be repaid when the restaurant opened, and thus the trial court properly concluded that the advances were loans (*see* *People v Grasso*, 13 Misc 3d 1227[A], 2006 NY Slip Op 52019[U], *20-21 [2006], *mod on other grounds* 54 AD3d 180 [2008]). Although the terms of the repayment are unclear since the agreement was not in writing and neither party anticipated that the restaurant would fail when they entered into the agreement, the evidence supports a finding that the earning of "future salaries and profits" was not intended to be a condition precedent to repayment but was an assumption upon which the agreement was **2 based. As the trial court found, defendant, as a shareholder, is entitled to an accounting once the funds are repaid.

We have reviewed defendant's remaining arguments and find them unavailing. Concur—Mazzarelli, J.P., Friedman, Acosta, Freedman and Abdus-Salaam, JJ.

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Exhibit 8

43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991

Bernard Fischer, Respondent-Appellant,
v.
Grace S. Maloney et al., Appellants-Respondents, et al., Defendant.

Court of Appeals of New York
Submitted January 9, 1978;
decided February 14, 1978

CITE TITLE AS: Fischer v Maloney

SUMMARY

Appeals, by plaintiff as of right and by defendants-appellants by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that court, entered March 21, 1977, which modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (Edwin Kassoff, J.), entered in Queens County, denying a motion by defendants-appellants for summary judgment. The modification consisted of granting the motion as to the first cause of action and severing that cause. The following question was certified by the Appellate Division: "Was the order of this court, dated March 21, 1977, insofar as it affirmed the denial of the defendants-appellants' motion to dismiss the second cause of action, properly made?"

Plaintiff, a tenant-shareholder in a residential co-operative corporation, against whom an action in defamation had been brought in the name of the corporation, instituted the present action against the directors of the corporation following the dismissal of that defamation action, asserting two causes of action. The first was under sections 70 and 71 of the Civil Rights Law and alleged that the defamation action was commenced by the directors vexatiously and maliciously in the name of the corporation but without its consent. The second was in tort for intentional infliction of severe emotional distress, and was based on a claim by plaintiff that the directors commenced the defamation action deliberately to malign, harass and intimidate him.

The Court of Appeals modified the order of the Appellate Division, to the extent of granting summary judgment in favor of the directors dismissing the second cause of action, affirmed it as so modified, and answered the certified question in the negative, holding, in an opinion by Judge Jones, that, since it was undisputed that the institution of the defamation action was authorized by the president of the corporation, the action could not be said to have been commenced or continued without its consent and, accordingly, no cause of action was stated under sections 70 and 71 of the Civil Rights Law, and that, as to the cause of action for intentional infliction of severe emotional distress, the conduct charged to the directors ***554** did not give rise to liability under that emerging ground of tort liability.

Fischer v Maloney, 56 AD2d 884, modified.

HEADNOTES

Civil Rights
Vexatious Suits Brought in Name of Another

() A tenant-shareholder in a co-operative corporation, who alleges that the directors thereof vexatiously and maliciously commenced a defamation action against him in the name of the corporation but without its consent, states no cause of action against the directors under sections 70 and 71 of the Civil Rights Law, where it is undisputed that the institution of the action was authorized by the president of the corporation.

Torts
Intentional Infliction of Severe Emotional Distress

() A tenant-shareholder in a co-operative corporation, who alleges that the directors thereof commenced a defamation action against him deliberately to malign, harass and intimidate him, thereby intentionally to inflict great mental and emotional distress, states no cause of action in tort for intentional infliction of severe emotional distress.

Corporations
Authority of President to Institute Action

() Where the president of a corporation authorizes the institution of an action in its name, the action cannot be said to have been commenced or continued without its consent.

Torts
Intentional Infliction of Severe Emotional Distress

() It may be questioned whether the doctrine of liability for intentional infliction of extreme emotional distress should be applicable where the conduct complained of falls well within the ambit of other traditional tort liability, such as malicious prosecution and abuse of process.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

36 NY Jur, Malicious Prosecution § 1; 59 NY Jur, Torts § 20

4 Carm-Wait 2d, § 29:343

Civil Rights Law §§70, 71

38 Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4 et seq.

23 Am Jur Proof of Facts pp 185 et seq., Intentionally Caused Emotional Distress

POINTS OF COUNSEL

Julius Gantman and *James B. Reich* for appellants-respondents.
***555** I. The court below properly dismissed plaintiff's first cause of action. *(West View Hills v Lizau Realty Corp.*, 6 NY2d 344; *Rothman & Schneider v Beckerman,* 2 NY2d 493; *Matter of Paloma Frocks,* 3 NY2d 572; *Twyeffort v Unexcelled Mfg. Co.*, 263 NY 6; *Hardin v Morgan Lithograph Co.*, 247 NY 332; *Cicero Ind. Dev. Corp. v Roberts,* 63 Misc 2d 565; *Di Sabato v Soffes,* 9 AD2d 297; *Andre v Pomeroy,* 35 NY2d 361; *Hanrog Distr. Corp. v Hanioti,* 10 Misc 2d 659; *Rubin v Irving Trust Co.*, 305 NY 288.) II. As no other viable cause of action was alleged in the complaint, that portion of the Supreme Court's order that denied summary judgment should have been reversed; the second cause of action should also be dismissed and judgment entered for defendants. *(Howard v Lecher,* 42 NY2d 109; *Bohm v Holzberg,* 47 AD2d 764; *Halio v Lurie,* 15 AD2d 62; *Ruza v Ruza,* 1 AD2d 669; *Tuvim v 10 E. 30 Corp.*, 38 AD2d 895; *Sachs v Weinstein,* 208 App Div 360; *Paul v Fargo,* 84 App Div 9.)
Edward L. Schiff and *Mark Jacobs* for respondent- appellant. I. The prior defamation action was prosecuted by defendants against plaintiff vexatiously and maliciously, in the name of Southridge Cooperative, Section 2, Inc., but without the latter's consent. Plaintiff may recover damages pursuant to sections 70 and 71 of the Civil Rights Law. *(Rapoport v Schneider,* 29 NY2d 396; *Cirrincione v Polizzi,* 14 AD2d 281.) II. The court below erred in dismissing plaintiff's first cause of action for damages pursuant to sections 70 and 71 of the Civil Rights Law and holding that the defamation lawsuit was commenced by the president of the corporation. *(Heaman v Rowell Co.*, 261 NY 229; *West View Hills v Lizau Realty Corp.*, 6 NY2d 344; *Goldenberg v Bartell Broadcasting Corp.*, 47 Misc 2d 105.) III. The course of conduct of the defendants was conspiratorial, secret, deliberate, extreme and outrageous in the service of inflicting harm, injury and mental distress upon plaintiff. *(Halio v Lurie,* 15 AD2d 62; *Battalla v State of New York,* 10 NY2d 237; *Long v Beneficial Fin. Co.*, 39 AD2d 11.) IV. Summary judgment does not lie in the present case where real factual issues are presented. *(Rutgers Chevrolet Co. v Goody,* 9 Misc 2d 837; *Esteve v Abad,* 271 App Div 725; *Falk v Goodman,* 7 NY2d 87; *Stone v Goodson,* 8 NY2d 8; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395; *Braun v Carey,* 280 App Div 1019; *Barrett v Jacobs,* 255 NY 520.) ***556**

OPINION OF THE COURT

Jones, J.

(,)Plaintiff does not state a cause of action either under sections 70 and 71 of the Civil Rights Law or in tort for intentional infliction of severe emotional distress. Accordingly, summary judgment should be granted dismissing the complaint.

Plaintiff is a tenant and shareholder in Southridge Cooperative, Section No. 2, Inc., a residential co-operative corporation. When the board of directors of the co-operative refused to meet with him and other tenant- stockholders of like mind, they formed a committee to be known as "Tenants Council" to obtain financial, managerial and operational information with respect to the management and operations

of the co-operative. Confronted with resistance from the directors and their refusal to disclose the desired information, the Tenants Council circulated a petition among all the tenant- stockholders calling for a special meeting of the stockholders for the purpose of voting to remove the entire board of directors from office. Plaintiff was active in soliciting signatures on the petition.

Friction ensued and an action in defamation was brought in the name of the co-operative against plaintiff charging that in the course of circulating the petition he had falsely accused the vice-president of the co-operative of having had her apartment painted at a cost of $4,000 to the co-operative. When the defamation action was dismissed for failure to state a cause of action on behalf of the co-operative corporation, plaintiff instituted the present action against individual members of the board of directors. His complaint sets forth two causes of action--the first under sections 70 and 71 of the Civil Rights Law alleges that the defamation action was commenced by defendants vexatiously and maliciously in the name of the co-operative but without its consent, the second is in tort for intentional infliction of severe emotional distress.

Defendants' motion for summary judgment dismissing the complaint for failure to state a cause of action was denied at Special Term. The Appellate Division modified by granting the motion to the extent of dismissing the first cause of action under sections 70 and 71 but affirmed the refusal to dismiss the second cause of action on the ground that it presented questions of fact which could only be resolved after a trial. We conclude that both causes of action should be dismissed. ***557**

(,)With reference to the first cause of action, even if it were to be concluded that there was a failure to comply literally with the provisions of the by-laws of the corporation in the giving of notice of the meeting of the board of directors at which it was decided to commence the defamation action, it is undisputed that the institution of the action was authorized by the president of the corporation. In this circumstance we agree with both courts below that the action cannot then be said to have been commenced or continued without the consent of the co-operative corporation. *(West View Hills v Lizau Realty Corp.*, 6 NY2d 344; see 12 NY Jur, Corporations, § 672; 2 Fletcher, Cyclopedia Corporations, § 618.) Accordingly no cause of action is stated under sections 70 and 71 of the Civil Rights Law.

(,)Similarly no cause of action is stated for intentional infliction of severe emotional distress, the allegations of the complaint and the assertions in their support being viewed in the perspective most favorable to plaintiff. He relies principally on *Halio v Lurie* (15 AD2d 62). We conclude that the present case does not come within the doctrine referred to in *Halio.* An action may lie for intentional infliction of severe emotional distress "for conduct exceeding all bounds usually tolerated by decent society" (Prosser, Torts [4th ed], § 12, p 56). The rule is stated in the Restatement, Torts 2d, as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" (§ 46, subd [1]; see for one aspect Comment *d:* "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"). We do not undertake here to delineate the boundaries of this emerging ground of tort liability. It suffices for present purposes to note that the conduct charged to defendants in the present case does not give rise to liability under this doctrine by any proper definition. It is only claimed that they commenced the defamation action deliberately to malign, harass and intimidate plaintiff, thereby intentionally to inflict great mental and emotional distress. Whatever may be alleged as to motivation, the institution of the defamation action in the circumstances disclosed in this record does not constitute conduct within the rule described by Dean Prosser and the Restatement. Indeed, it ***558** may be questioned whether the doctrine of liability for intentional infliction of extreme emotional distress should be applicable where the conduct complained of falls well within the ambit of other traditional tort liability, here malicious prosecution and abuse of process. We also note that the conduct of these defendants does not fit under either of what appear to be the only two cases in point in the intermediate appellate courts in our State. *(Long v Beneficial Fin. Co.*, 39 AD2d 11; cf. Restatement, op cit, § 46, subd [1], Comment *e; Halio v Lurie,* 15 AD2d 62, 65-67, supra.;*)*

For the reasons stated the order of the Appellate Division should be modified, with costs, to the extent of granting summary judgment in favor of defendants dismissing the second cause of action, and as so modified, affirmed.

Chief Judge Breitel and Judges Jasen, Gabrielli, Wachtler, Fuchsberg and Cooke concur.

Order modified, with costs to defendants, in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative. ***559**

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Exhibit 9

57 Fed.Appx. 141

United States Court of Appeals, Fourth Circuit.

Kenneth GANTT, Plaintiff–Appellant,
v.
William Alan WHITAKER, Sheriff of Davie County, in his official capacity; William Lee Whitesides, in his individual and official capacities; the Cincinnati Insurance Company, as Surety; County of Davie, Defendants–Appellees.

No. 02–1340.
|
Argued Dec. 5, 2002.
|
Decided Jan. 23, 2003.

Synopsis

Arrestee brought § 1983 action against sheriff and deputy, alleging false arrest and malicious prosecution under Fourth Amendment. The United States District Court for the Middle District of North Carolina, William L. Osteen, J., 203 F.Supp.2d 503, granted officers' motion for summary judgment. Arrestee appealed. The Court of Appeals held that: (1) probable cause justified arrest for violating statutes prohibiting impersonation of an officer, sale of alarm systems without a license, and obtaining payments by false pretenses; (2) sheriff and deputy were not liable in their official capacities; and (3) newspaper article was inadmissible hearsay.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (6)

[1] **Arrest**
Identification or description of offender or vehicle

Probable cause justified arrest for violating statute prohibiting impersonation of an officer; Sheriff's Office received reports that an individual was impersonating a law enforcement officer while attempting to sell alarm systems, the individual was identified as arrestee, two incident reports stated that arrestee had represented himself to local residents as a law enforcement officer, and a gold star emblem, marked with the words "Sheriff's Association," was observed on the outside of arrestee's briefcase. U.S.C.A. Const.Amend. 4; West's N.C.G.S.A. § 14–277(a).

5 Cases that cite this headnote

[2] **Arrest**
Appearance, acts, and statements of persons arrested

Probable cause justified arrest for violating statute prohibiting sale of alarm systems without a license; reports indicated that an individual was impersonating a law enforcement officer while attempting to sell alarm systems, arrestee told deputy that he sold alarms but did not need a license, two incident reports stated that arrestee had attempted to sell alarm systems to local residents, and deputy found demonstration kit for home alarm sales in arrestee's briefcase. U.S.C.A. Const.Amend. 4; West's N.C.G.S.A. § 74D–2.

1 Cases that cite this headnote

[3] **Arrest**
Personal knowledge or observation in general

Probable cause justified arrest for violating statute prohibiting obtaining payments by false pretenses; deputy had reliable information that arrestee was representing himself as a law

enforcement officer in an attempt to sell alarm systems, deputy could reasonably conclude that the representation was false and calculated to deceive for purpose of obtaining money from potential customers, and report indicated that local residents gave arrestee a deposit for the purchase of an alarm system. U.S.C.A. Const.Amend. 4; West's N.C.G.S.A. § 14–100.

2 Cases that cite this headnote

[4] **Civil Rights**
Criminal law enforcement; prisons

Arrest was not result of unconstitutional or illegal county policy, custom, ordinance, regulation, or decision, and therefore sheriff and deputy were not liable in their official capacities in arrestee's § 1983 action alleging that false arrest and malicious prosecution violated Fourth Amendment. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

12 Cases that cite this headnote

[5] **Evidence**
Writings

Newspaper article was inadmissible hearsay in § 1983 action alleging that false arrest and malicious prosecution violated Fourth Amendment; arrestee sought to introduce the article for purpose of proving factual matters asserted therein, and failed to establish prerequisites for applicability of an exception to the hearsay rule. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

12 Cases that cite this headnote

[6] **Federal Civil Procedure**
Time for Motion for Taking

In § 1983 action alleging that false arrest and malicious prosecution violated Fourth Amendment, denial of permission to depose author of newspaper article was not abuse of discretion; discovery period had closed. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

7 Cases that cite this headnote

***142** Appeal from the United States District Court for the Middle District of North Carolina, at Durham. William L. Osteen, District Judge. (CA–00–383–1).

Attorneys and Law Firms

ARGUED: Stephen Luke Largess, Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumter, P.A., Charlotte, North ***143** Carolina, for Appellant. Robert Danny Mason, Jr., Womble, Carlyle, Sandridge & Rice, P.L.L.C., Winston–Salem, North Carolina, for Appellees. **ON BRIEF:** James R. Morgan, Jr., Womble, Carlyle, Sandridge & Rice, P.L.L.C., Winston–Salem, North Carolina, for Appellees.

Before NIEMEYER, WILLIAMS, and TRAXLER, Circuit Judges.

Affirmed by unpublished PER CURIAM opinion.

OPINION

PER CURIAM.

****1** Kenneth T. Gantt initiated this proceeding in the United States District Court for the Middle District of North Carolina under 42 U.S.C.A. § 1983. He contended that Sheriff William Allen Whitaker and Deputy William Lee Whitesides of the Davie County Sheriff's Office (the Sheriff's Office) violated his constitutional rights by causing him to be arrested and prosecuted, without probable cause, on charges of impersonating a law enforcement officer, selling alarms without a license, and obtaining property under false pretenses. He also asserted various related state law claims. The district court entered summary judgment in favor of Whitaker and Whitesides on the basis of qualified immunity, and this appeal followed. For the reasons set forth below, we affirm.

I.

A.

On April 9, 1999, the Sheriff's Office received several calls from citizens reporting that an individual impersonating a law enforcement officer was attempting to sell alarm systems and/or self-defense lessons door-to-door in the Joe Road/Highway 64 East area of Davie County.[1] The impersonator was reportedly a black male driving a black Blazer. In response to these calls, Deputy Brown was dispatched to the vicinity but found no one meeting the description.

That night, a local television station aired a story in which Sergeant Diggs reported that a black male was impersonating an officer and selling alarms and/or self-defense lessons. Shortly thereafter, the Sheriff's Office received two additional calls from local residents, Paul Johnson and Jo Anne Allen, who each reported being visited by a man attempting to sell alarm systems.

Brown was dispatched to talk with Johnson. Johnson informed Brown that a man identifying himself as Gantt and driving a blue minivan had attempted to sell him a wireless alarm system earlier that day. After speaking with Johnson, Brown prepared an incident report indicating that Gantt "possibly represent [ed] [him]self as a law enforcement officer to sell alarm systems." (J.A. at 190–91.)

Diggs was dispatched to respond to Allen's call. Allen and her husband informed Diggs that a black male identifying himself as Gantt had come to their residence, told them he worked with the Sheriff's Office, and offered to sell them an alarm system. According to the Allens, Gantt was carrying a black briefcase-type bag with a gold star emblem on it and was driving a blue minivan. Diggs completed an incident report and, in the space reserved for how the crime was committed, indicated that Gantt stated that he worked for the Sheriff's Office. In the block of the report marked *144 "Crime," Diggs originally wrote "personating an officer," but he later changed this to "suspicious person." (J.A. at 188.)

The next morning, Whitesides reported for duty and attended a shift meeting where the night officers conveyed information to those beginning the morning shift. At this meeting, Whitesides was instructed to be on the lookout for a black male, possibly identifying himself as Gantt, who was suspected of impersonating a law enforcement officer to sell alarm systems and/or self-defense lessons.

**2 Gantt, having seen a rebroadcast of the news report, went to the Mocksville Police Department to determine if he was the person described in the report. The Mocksville Police Department called the Sheriff's Office and told them that a black male identifying himself as Kenneth Gantt was there and wanted to speak with someone about the report of impersonating a law enforcement officer. Whitesides was dispatched to investigate and, upon arrival, met Gantt. At Whitesides's request, Gantt followed Whitesides back to the Sheriff's Office in his own vehicle.

When Gantt arrived at the Sheriff's Office, he asked to speak with the Sheriff. Whitaker agreed and went to the hallway to speak with Gantt. Gantt expressed his frustration with the news report and asked Whitaker to issue a retraction, noting how harmful the news report would be for his business. Whitaker told Gantt that he would not assist in having the report retracted. Whitaker later stated that he found Gantt to be "belligerent and arrogant" during their conversation. (J.A. at 698.) According to Gantt, Whitaker then met with Whitesides about filing charges against Gantt.

When Whitesides returned, he asked Gantt if he sold alarms and, if so, whether he had a license. Gantt stated that he did sell alarms but that he did not need a license. Whitesides then asked Gantt if he had a briefcase with a gold star emblem on it. Gantt replied that he did and went to his car to retrieve the briefcase for Whiteside's inspection. Whitesides noted that the briefcase had a large, gold Sheriff's Association star emblem on the side. The briefcase contained a demonstration kit for a home alarm system and several receipts, including one signed by the Allens.

At this time, Whitesides went to discuss the situation with Whitaker, who advised Whitesides to telephone the district attorney's office. Whitaker and Whitesides both allege that the telephone call was for the purpose of determining whether Gantt's conduct constituted a crime and whether the district attorney's office would prosecute such a case. Gantt, on the other hand, contends that Whitesides and Whitaker had already decided that they would charge Gantt with a crime and contacted the district attorney's office to familiarize themselves with the statutory provisions governing alarm licensing.

When Whitesides telephoned the district attorney's office, he spoke with Assistant District Attorney Douglas Vreeland, and explained the information he had regarding Gantt. According to Vreeland, the facts relayed by Whitesides matched the requisite elements of the offense of impersonating an officer. Vreeland also pointed out statutory provisions governing the offenses of selling alarms without a license and obtaining property by false pretenses.

After this conversation, Whitesides conveyed the information relating to the case to a magistrate in Davie County. The magistrate researched the statutes governing the offenses of obtaining property by false pretenses, selling alarms without a license, and impersonating an officer. Concluding that the facts conveyed by Whitesides supported each of the elements ***145** of these offenses, the magistrate found probable cause to issue warrants for Gantt's arrest. Whitesides served the warrants on Gantt and arrested him.

****3** Over the next few days, Whitesides conducted further investigation and determined that Gantt had similarly approached other local citizens. On this basis, additional charges were filed against Gantt.

Less than two months later, the district attorney's office dismissed all charges against Gantt except one alarm license violation. After the North Carolina Alarm Licensing Board ruled that Gantt did not need a license and was not surveying people's homes, this remaining charge was voluntarily dismissed.

B.

On April 17, 2000, Gantt filed this action against Whitaker, in his official capacity, Whitesides, in his individual and official capacities, and Cincinnati Insurance Company, as a surety on the Sheriff's surety bond (collectively, Defendants).[2] Gantt alleged a cause of action under 42 U.S.C.A. § 1983 for violations of the Fourth Amendment, including false arrest and malicious prosecution, and various state law claims.

Defendants filed a motion for summary judgment as to all claims, and Gantt filed a motion for partial summary judgment as to his § 1983 Fourth Amendment claims and his state law false arrest and malicious prosecution claims. Following oral argument, the district court granted Defendants' motion for summary judgment, denied Gantt's motion for partial summary judgment, and declined to exercise jurisdiction over Gantt's state law claims. Gantt timely noted this appeal.

II.

Gantt first argues that the district court erred by concluding that Whitesides is entitled to summary judgment on the basis of qualified immunity. We review de novo the district court's grant of summary judgment. *See* *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 196 (4th Cir.1997). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c).

Qualified immunity protects government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The steps in the qualified immunity analysis are sequential: the court " 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all,' " before " 'proceed[ing] to determine whether that right was clearly established at the time of the alleged violation.' " *Wilson v. Layne,* 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (quoting *Conn v. Gabbert,* 526 U.S. 286, 290, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999)); *see also* *Saucier v. Katz,* 533 U.S. 194, 200–01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Anderson v. Creighton,* 483 U.S. 635, 638–41, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *Milstead v. Kibler,* 243 F.3d 157, 161–62 (4th Cir.2001).

Applying this framework, we evaluate whether the facts, taken in the light most favorable to Gantt, show that Whitesides's ***146** conduct violated any of Gantt's federal rights. In identifying the specific constitutional right allegedly infringed, we first address Gantt's argument that the district court erred by failing to recognize that Gantt had properly alleged at least two distinct constitutional violations: a "false arrest" § 1983 claim and a "malicious prosecution" § 1983 claim.[3] The district court stated that "[m]alicious

prosecution is a common law cause of action which is not independently redressable under § 1983," and concluded that the claims "really merge into one claim based on a Fourth Amendment violation." (J.A. at 938–39 n. 4.)

**4 Section 1983 "is not itself a source of substantive rights, but a method for vindicating *federal* rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan,* 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) (emphasis added). Because § 1983 does not provide redress for violations of state law, *White v. Chambliss,* 112 F.3d 731, 738 (4th Cir.1997), we previously have made clear that "there is no such thing as a ' § 1983 malicious prosecution' claim. What we term[ ] a 'malicious prosecution' claim ... is simply a claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution —specifically, the requirement that the prior proceeding terminate favorably to the plaintiff. It is not an independent cause of action." *Lambert v. Williams,* 223 F.3d 257, 262 (4th Cir.2000) (internal citation and footnote omitted), *cert. denied,* 531 U.S. 1130, 121 S.Ct. 889, 148 L.Ed.2d 797 (2001); *see also* *Albright v. Oliver,* 510 U.S. 266, 271, 275, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (holding that a claim for unlawful initiation of criminal proceedings could be brought under § 1983, if at all, only under the Fourth Amendment); *Rogers v. Pendleton,* 249 F.3d 279, 294 (4th Cir.2001) ("Rogers' malicious prosecution claim is so intertwined legally with his false arrest claim as to stand or fall with that claim for qualified immunity purposes. We conclude that this claim is wholly derivative of the false arrest claim for qualified immunity purposes and thus do not analyze it separately." (internal citation omitted)). Thus, we agree with the district court that Whitesides' conduct—both in terms of the arrest and the subsequent criminal prosecution—must be evaluated solely by reference to the Fourth Amendment's prohibition against unreasonable seizures. [4]

To establish that his seizure was unreasonable, Gantt must demonstrate that his arrest was without probable cause. *Dunaway v. New York,* 442 U.S. 200, 213, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) ("Fourth Amendment seizures are 'reasonable' only **147 if based on probable cause."); *Porterfield v. Lott,* 156 F.3d 563, 568–71 (4th Cir.1998) (holding that a Fourth Amendment claim founded on malicious prosecution must be analyzed to determine whether probable cause for the arrest was lacking). Probable cause is determined from the totality of the circumstances known to the officer at the time of the arrest. *United States v. Garcia,* 848 F.2d 58, 59–60 (4th Cir.1988). For probable cause to exist, there need be only enough evidence to warrant the belief of a reasonable officer that an offense has been or is being committed. *Wong Sun v. United States,* 371 U.S. 471, 479, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). "Probable cause requires more than bare suspicion but requires less than evidence necessary to convict." *Porterfield,* 156 F.3d at 569 (internal quotation marks omitted).

Two factors govern the determination of probable cause in any situation: "the suspect's conduct as known to the officer, and the contours of the offense thought to be committed by that conduct." *Pritchett v. Alford,* 973 F.2d 307, 314 (4th Cir.1992). Therefore, probable cause "could be lacking in a given case, and an arrestee's right violated, either because of an arresting officer's insufficient factual knowledge, or legal misunderstanding, or both." *Id.* Accordingly, the appropriate probable cause inquiry focuses on the charged offense in relation to the information known to Whitesides at the time of Gantt's arrest. Further, because "the reasonableness of a seizure under the Fourth Amendment should be analyzed from an objective perspective [,] ... the subjective state of mind of the defendant, whether good faith or ill will, is irrelevant." *Brooks v. City of Winston–Salem, N.C.,* 85 F.3d 178, 184 n. 5 (4th Cir.1996).

A. *Impersonating an Officer*

**5 Under North Carolina law, the crime of impersonating an officer is defined in relevant part as follows:

> (a) No person shall falsely represent to another that he is a sworn law-enforcement officer. As used in this section, a person represents that he is a sworn lawenforcement officer if he:
>
> (1) Verbally informs another that he is a sworn law-enforcement officer, whether or not the representation refers to a particular agency;
>
> (2) Displays any badge or identification signifying to a reasonable individual that the person is a sworn

> law-enforcement officer, whether or not the badge or other identification refers to a particular law-enforcement agency.

N.C. Gen.Stat. Ann. § 14–277(a) (Lexis 2001); *see also State v. Chisholm,* 90 N.C.App. 526, 369 S.E.2d 375, 378 (1988) ("To have convicted defendant ... under [§] 14–277 the jury was required to find that defendant represented himself as a sworn law-enforcement officer to another.").

[1] Considering the totality of the circumstances of which Whitesides had knowledge at the time, we find that there was sufficient information to justify a reasonable belief that Gantt had violated § 14–277(a). First, Whitesides had been informed at a shift meeting that the Sheriff's Office had received calls from residents reporting that an individual was impersonating a law enforcement officer and was attempting to sell alarm systems. Second, the individual was identified as Gantt. Third, Brown's incident report stated that Gantt had represented himself to a local resident "as a law enforcement officer to sell alarm systems."[5] (J.A. at ***148** 190–91.) Fourth, Diggs's incident report stated that Gantt told the Allens that he "worked for" the Sheriff's Office. (J.A. at 189.) Fifth, according to Diggs's incident report, the Allens had observed a gold star emblem on the outside of Gantt's briefcase. Sixth, Whitesides personally observed a "pretty big" gold star emblem, marked with the words "Sheriff's Association" on the outside of Gantt's briefcase. (J.A. at 723.) The briefcase contained a demonstration kit for alarm systems and receipts from the sale of alarm systems, making it more likely than not that Gantt carried the bag with him while attempting to sell alarm systems. Regardless of whether this evidence is sufficient to support a conviction under § 14–277(a), the evidence is sufficient to establish probable cause to believe that Gantt had violated the provision.[6]

B. *Attempting to Sell Alarm Systems Without a License*

North Carolina General Statute § 74D–2 makes it a crime for a person or entity to "engage in or hold itself out as engaging in an alarm systems business without first being licensed in accordance with this Chapter." N.C. Gen.Stat. Ann. § 74D–2 (Lexis 2001). Gantt admitted to Whitesides that he was selling alarm systems door-to-door without a license, and this admission was further corroborated by the contents of Gantt's briefcase. Thus, the only issue is whether Whitesides had probable cause to believe that Gantt was engaged in or holding himself out as engaged in "an alarm systems business."

****6** **[2]** An "alarm systems business" is defined in pertinent part by statute as

> any person ... which [sic] sells or attempts to sell by engaging in a personal solicitation at a residence ... when combined with personal inspection of the interior of the residence ... to advise on specific types and specific locations of alarm system devices, installs, services, monitors or responds to electrical, electronic or mechanical alarm signal devices, burglar alarms, television cameras or still cameras used to detect burglary, breaking or entering, intrusion, shoplifting, pilferage, or theft.

Id. Gantt notes that the North Carolina Alarm Licensing Board ultimately concluded that he was not inspecting the interior of residences and, therefore, did not need a license to sell his alarm systems. This fact, however, is of little consequence, in that evidence sufficient to find an individual guilty of an offense is not required to establish probable cause. *Porterfield,* 156 F.3d at 569. From the incident reports, Whitesides's interview with Gantt, and Whitesides's personal inspection of Gantt's briefcase, Whitesides reasonably believed that Gantt was entering residents' homes in connection with the sale and installation of alarm systems, and Whitesides also reasonably believed that Gantt had demonstrated ***149** the alarm system inside the Allens' residence. A reasonable person could logically assume that the installation and/or demonstration of the alarm system involved some inspection of the residence as well as advice on the type or proper location for the alarm system. Thus, the information possessed by Whitesides at the time of the arrest was sufficient to justify his belief that Gantt had violated § 74D–2.

C. *Obtaining Property By False Pretenses*

[3] The elements of the crime of obtaining property by false pretenses are: (1) a false representation of a past or subsisting fact or a future fulfillment or event; (2) which is calculated and intended to deceive; (3) which does in fact deceive; and (4) by which the defendant obtains or attempts to obtain something of value from another. N.C. Gen.Stat. Ann. § 14–100 (Lexis 2001); *State v. Hutchinson,* 139 N.C.App. 132, 532 S.E.2d 569, 573 (2000). As detailed above, Whitesides had reliable information that Gantt was representing himself as a law enforcement officer in an attempt to sell alarm systems. Whitesides could reasonably conclude that this representation was false and was calculated to deceive for the purpose of obtaining money from potential customers. Diggs's report indicated that the Allens gave Gantt a deposit for the purchase of an alarm system, which provides a reasonable inference that they were in fact deceived by Gantt's false representation that he worked for the Sheriff's Office. Thus, Whitesides possessed probable cause to believe that Gantt had violated § 14 100.

Because Whitesides possessed probable cause to arrest Gantt for each of the charged offenses, Gantt cannot establish any unreasonable seizure in violation of the Fourth Amendment.[7] Having concluded that Gantt has not demonstrated any constitutional violation, it becomes unnecessary to consider whether the right at issue was clearly established such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202, 121 S.Ct. 2151.

III.

**7 [4] Gantt next claims that the district court erred by entering summary judgment in favor of Whitaker and Whitesides (Appellees) on his official capacity claim. As explained above, Gantt is unable to show any constitutional violation. Thus, his official capacity claim fails as a matter of law. *See Belcher v. Oliver,* 898 F.2d 32, 36 (4th Cir.1990) ("Because it is clear that there was no constitutional violation we need not reach the question of whether a municipal policy was responsible for the officers' actions."). Moreover, even assuming that Whitesides violated Gantt's constitutional rights, Gantt's official capacity claim fails because Gantt has not submitted any evidence that his arrest was the result of an unconstitutional or illegal county policy, custom, ordinance, regulation, or decision. *See Monell v. Dep't of Soc. Serv.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a *150 government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."); *Zepp v. Rehrmann,* 79 F.3d 381, 385 (4th Cir.1996) ("Because municipal liability cannot rest on the doctrine of respondeat superior, Zepp's § 1983 claims against Harford County and the defendants in their official capacities must fail."). Accordingly, the district court did not err in granting summary judgment in favor of Appellees with respect to Gantt's official capacity claim.

IV.

Gantt's final claim of error involves a newspaper article that he submitted in response to Appellees' motion for summary judgment. The article contained statements allegedly made by Whitaker about Gantt's arrest. (Appellant's Br. at 5.) Appellees filed a motion to strike the article as inadmissible hearsay, which the district court granted. (J.A. at 894–95.) Gantt argues that this decision was erroneous. In the alternative, Gantt argues that the district court should have allowed him leave to depose the author of the article. We review a district court's evidentiary and procedural rulings for an abuse of discretion. *Persinger v. Norfolk & Western Ry. Co.,* 920 F.2d 1185, 1187 (4th Cir.1990).

[5] This circuit has consistently held that newspaper articles are inadmissible hearsay to the extent that they are introduced "to prove the factual matters asserted therein." *United States v. ReBrook,* 58 F.3d 961, 967 (4th Cir.1995). Gantt sought to introduce the article for this impermissible purpose and failed to establish the prerequisites for applicability of an exception to the hearsay rule. Thus, the district court did not abuse its discretion by excluding the article. *Md. Highways Contractors Ass'n v. Maryland,* 933 F.2d 1246, 1251 (4th Cir.1991) ("[H]earsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment.").

**8 [6] Moreover, the district court did not abuse its discretion by denying Gantt's request for leave to depose the author of the newspaper article after the discovery period had closed. *See RGI, Inc. v. Unified Indus., Inc.,* 963

F.2d 658, 662 (4th Cir.1992) (noting that the trial court possesses discretion to determine when to allow supplemental material to resolve a summary judgment motion). Nor did the district court err by denying Gantt's motion for voluntary dismissal. *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 358 (10th Cir.1996) ("We agree with the district court that a party should not be permitted to avoid an adverse decision on a dispositive motion by dismissing a claim without prejudice."). Gantt's arguments to the contrary are unpersuasive.

V.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

All Citations

57 Fed.Appx. 141, 2003 WL 152856

Footnotes

1 In summarizing the facts in this case, we resolve all disputed factual issues in favor of Gantt, the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

2 Gantt originally included Davie County as a defendant, but all claims against the County were voluntarily dismissed after Gantt conceded that the County was not a proper party. (J.A. at 930 n. 2.)

3 In a footnote of his appellate brief, Gantt summarily asserts that the district court failed to address his claim that the Fourth Amendment also was violated when he was unlawfully seized at the Sheriff's Office prior to his arrest. Because Gantt has failed to comply with the dictates of Federal Rule of Appellate Procedure 28(a)(9)(A) regarding this claim, we consider him to have abandoned it. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n. 6 (4th Cir.1999) ("Federal Rule of Appellate Procedure 28(a)(9)(A) requires that the argument section of an appellant's opening brief must contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.... Failure to comply with the specific dictates of this rule with respect to a particular claim triggers abandonment of that claim on appeal." (internal citations and quotation marks omitted)).

4 In relevant part, the Fourth Amendment protects "[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures." U.S. Const. amend. IV.

5 There is uncontested evidence that Whitesides reviewed Diggs's and Brown's incident reports before seeking an arrest warrant. (J.A. at 719–20.)

6 Gantt also alleges that Whitesides violated his Fourth Amendment rights by intentionally lying to the magistrate and claiming that Gantt had displayed his Sheriff Association membership card. Because Gantt's display of his Sheriff Association membership card was not necessary to the finding of probable cause, and thus the issuance of a warrant, *see supra* text pp. ——– – ———, Whitesides did not violate Gantt's Fourth Amendment rights even if Gantt's allegation is true, *see Franks v. Delaware*, 438 U.S. 154, 155, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (holding that, to show a violation of defendant's Fourth Amendment rights during the warrant process, defendant must make a substantial showing that an affiant for an arrest warrant knowingly, intentionally, or recklessly included a false statement and that "the allegedly false statement [wa]s necessary to the finding of probable cause"); *United States v. Akinkoye*, 185 F.3d 192, 199 (4th Cir.1999) (finding no *Franks* violation because probable cause existed without the allegedly false identifications).

7 In fact, other courts have held that an officer must have probable cause for at least one charge for an arrest on multiple charges to withstand a Fourth Amendment challenge. *See, e.g., Barry v. Fowler*, 902 F.2d 770, 773 n. 5 (9th Cir.1990) (holding that an officer need only show probable cause for one of the charged offenses for a seizure to be constitutional, even if the defendant was arrested for more than one offense); *Edwards v. City of Philadelphia*, 860 F.2d 568, 575–76 (3d Cir.1988) (same) (citing *Linn v. Garcia*, 531 F.2d 855, 862 (8th Cir.1976)).

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Exhibit 10

179 A.D.2d 562, 578 N.Y.S.2d 574

Happy Banana, Ltd., Respondent,
v.
Tishman Construction Corporation
of N. Y. et al., Appellants.

Supreme Court, Appellate Division,
First Department, New York
45058
(January 28, 1992)

CITE TITLE AS: Happy Banana
v Tishman Constr. Corp. of N.Y.

HEADNOTE

CORPORATIONS
CAPACITY TO SUE
Individuals Empowered to Bring Suit on Behalf of Corporation

() Plaintiff alleges defendants' activities in constructing and renovating building next door to its restaurant so interfered with its customer traffic as to force it to go out of business; upon completion of disclosure, defendants moved to dismiss complaint on ground plaintiff's president, who had resigned as part of arrangement with its creditor, did not have authority to commence action in following month; in opposition, plaintiff presented affidavit from ex-president stating he was plaintiff's secretary at time action was commenced, and affidavit from creditor to same effect and also stating action was authorized by plaintiff's Board of Directors; motion to dismiss was properly denied for lack of proof plaintiff did not authorize commencement of action; president is normally empowered to institute action; where, as here, secretary of corporation was apparently alone conducting its business affairs, there is no reason why he should not be able to institute action on corporations' behalf against outsider.

Order, Supreme Court, New York County (Francis N. Pecora, J.), entered July 10, 1990, which, to the extent appealed from, denied defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff alleges that defendants' activities in constructing and renovating a building next door to its restaurant so interfered with its customer traffic as to force it to go out of business. Upon completion of disclosure, defendants moved to dismiss the complaint on the ground that plaintiff's president, who had resigned in December 1988 as part of an arrangement with its creditor, did not have the authority to commence the action in January 1989. In opposition, plaintiff presented an affidavit from the ex-president stating that he was plaintiff's secretary at the time the action was commenced, and an affidavit from the creditor to the same effect and also stating that the action was authorized by plaintiff's Board of Directors. ***563**

The motion to dismiss was properly denied for lack of proof that plaintiff did not authorize commencement of an action (*see, Vishipco Line v Chase Manhattan Bank,* 660 F2d 854, *cert denied* 459 US 976). Absent a bylaw prohibition, a president is normally empowered to institute an action (Business Corporation Law § 715 [g]; *Polchinski Co. v Cemetery Floral Co.,* 79 AD2d 648). Where, as here, the secretary of a corporation was apparently alone conducting its business affairs, there is no reason why he should not be able to institute an action on the corporation's behalf against an outsider (*see, Rothman & Schneider v Beckerman,* 2 NY2d 493).

Concur--Rosenberger, J. P., Wallach, Kupferman, Asch and Rubin, JJ.

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Exhibit 11

10 Misc.2d 286
Supreme Court, New York County, New York,
Special Term, Part III.

HILLCREST PAPER COMPANY, Inc., Plaintiff,
v.
Jack OHLSTEIN, Arthur Ohlstein,
Crestwood Paper Company, Inc., Defendants.

March 20, 1958.

Synopsis

Civil action. Defendants appeared specially and moved for an order vacating service of summons and complaint, and sought dismissal of the complaint on ground that institution of the suit was unauthorized, and that plaintiff lacked capacity to sue. The Supreme Court, Special Term, Saypol, J., held that where entire management and operation of a corporation was left to a single remaining officer and director, it was his authority and responsibility to institute suit for protection and preservation of the business and assets of the corporation, and strangers to the corporation would not be permitted to question that authority.

Motion denied.

West Headnotes (2)

[1] **Process**
Quashing or vacating writ or other process or notice

Where defendants appeared specially and moved for an order vacating service of summons and complaint, but actually sought dismissal of the complaint on ground that institution of the suit was unauthorized, and that plaintiff lacked capacity to sue, special appearance would be overruled. Civil Practice Act, § 237–a; Rules of Civil Practice, rule 107.

1 Cases that cite this headnote

[2] **Corporations and Business Organizations**
Persons entitled to question authority

Where entire management and operation of a corporation was left to a single remaining officer and director, it was his authority and responsibility to institute suit for protection and preservation of the business and assets of the corporation, and strangers to the corporation would not be permitted to question that authority.

3 Cases that cite this headnote

Attorneys and Law Firms

**828 *286 Harris Birnbaum, Brooklyn, for plaintiff.

Leibowitz & Fields, for defendants Ohlstein.

A. Bertram Roth, New York City, for defendant Crestwood.

Opinion

*287 IRVING H. SAYPOL, Justice.

[1] Defendants, appearing specially, move for an order vacating the service of the summons and complaint. Actually they seek the dismissal of the complaint, contending that the institution of this suit is unauthorized, and that plaintiff lacks capacity to sue. In fact, the ground is urged for dismissal pursuant to rule 107 of the Civil Practice Act. Consequently the special appearance must be overruled (Civil Practice Act, § 237–a).

[2] The person verifying the complaint is the sole officer and director of the plaintiff-corporation. At the time of the verification the remaining officers and directors had resigned. No defendant is a stockholder of record. Upon this record it is established that the business and affairs of the plaintiff-corporation were surrendered to and are now in the sole charge of the single remaining officer and director.

Defendants rely on Tidy-House Paper Corp. of New York v. Adlman, 4 A.D.2d 619, 168 N.Y.S.2d 448. That authority supports the plaintiff's contention. There each of two individuals owned 50 per cent of the stock of the corporation and the control of the board of directors was equally divided between them. While there it was stated that failure to seek approval of the directors for institution of suit is the same as though approval had been expressly refused, approval here if one there be, must rest in the action of the sole remaining officer and director, and the question is therefore raised whether authority to institute this suit may be thus

presumed. Apparently no stockholders' agreement exists for none is referred to which may have any effect upon the resolution of this issue. Since the entire management and operation of the company was left to the remaining officer and director, it was his authority and responsibility to institute suits for the protection and preservation of the business and assets of the company, and strangers to the corporation may not be permitted to question that authority (Rothman & Schneider, Inc., v. Beckerman & Lerner, 2 N.Y.2d 493, 161 N.Y.S.2d 118; ****829** Matter of Paloma Frocks [Shamokin Sportswear Corp.] 3 N.Y.2d 572–575, 576, 170 N.Y.S.2d 509–511, 512). Since none of the defendants is an officer, director or stockholder of the corporation, the rule of equal control does not apply and the right to invoke the rule was voluntarily surrendered.

The motion is denied.

All Citations

10 Misc.2d 286, 172 N.Y.S.2d 827

End of Document

Exhibit 12

79 A.D.2d 648, 433 N.Y.S.2d 825

Joseph Polchinski Company et al., Appellants,
v.
Cemetery Floral Company, Inc., et al., Respondents

Supreme Court, Appellate Division,
Second Department, New York
1973 E
December 15, 1980

CITE TITLE AS: Joseph Polchinski Co. v Cemetery Floral Co.

In an action pursuant to article 15 of the Real Property Actions and Proceedings Law, plaintiffs appeal from an order of the Supreme Court, dated April 28, 1980 and entered in Westchester County, which granted defendants' cross motion to dismiss the complaint pursuant to CPLR 3211 (subd [a]) on the ground, *inter alia*, that the commencement of the action was not properly authorized by the plaintiff corporation, and, in effect, denied plaintiffs' motion for a preliminary injunction.

HEADNOTES

CORPORATIONS
OFFICERS AND DIRECTORS

() Although defendants maintain that by-law of corporate plaintiff, that 'At all meetings of [the] stockholders, all questions * * * shall be determined by a unanimous vote of the stockholders', required unanimous consent of plaintiff corporation's shareholders in order to institute this action, however, by statute, any restriction on powers of board of directors must be placed in certificate of incorporation (Business Corporation Law, §§ 701, 620, subd [b]), so that by-law would be ineffective to shift this managerial prerogative into hands of shareholders (Business Corporation Law, § 601, subd [c]) --- Moreover, it is extremely doubtful whether by-law can be read in manner which defendants suggest --- Furthermore, this by-law would appear to be ineffective in any event, as subdivision (b) of section 614 and section 616 (subd [a], par [2]) of Business Corporation Law prohibit requirement of greater than majority vote by shareholders for transaction of corporate business unless certificate of incorporation so provides --- Accordingly, statutory norm of majority voting would appear to be applicable herein (Business Corporation Law, § 614, subd [b]).

CORPORATIONS
OFFICERS AND DIRECTORS

() In this action for declaration of easement in favor of corporate plaintiff across land owned by individual defendants and leased to corporate defendant, defendants contend that commencement of action solely at behest of plaintiff corporation's president was unauthorized --- However, it is well settled that absent provision in certificate of incorporation or by-laws or action by board of directors prohibiting president from defending and instituting suit in name of and in behalf of corporation, he must be deemed, in discharge of his duties, to have presumptive authority to so act --- Since certificate of incorporation and bylaws of corporate plaintiff do not restrict this 'presumptive' power, it must be concluded that corporate president possessed requisite authority to act to protect corporate interests especially where it appears that, by resolution, board of directors voted to authorize instant lawsuit; thus, even if initially unauthorized, it would appear that this subsequent resolution would serve to ratify earlier action taken by corporate president.

Order reversed, on the law, with $50 costs and disbursements, motion for a preliminary injunction granted and cross motion to dismiss denied. The matter is remitted to ***649** Special Term to fix the amount of a bond (see CPLR 6312, subd [b]).

In this action for the declaration of an easement in favor of the corporate plaintiff across land owned by the individual defendants and leased to the corporate defendant, defendants contend that the commencement of the action solely at the behest of the plaintiff corporation's president was unauthorized. However, it is well settled that "Absent a provision in the [certificate of incorporation or] by-laws or action by the board of directors prohibiting the president from defending and instituting suit in the name of and in behalf of the corporation, he must be deemed, in the discharge of his duties, to have presumptive authority to so act" *(West View Hills v Lizau Realty Corp.*, 6 NY2d 344, 348). Since the certificate of incorporation and by-laws of the corporate plaintiff do not restrict this "presumptive"

power, it must be concluded that the corporate president possessed the requisite authority to act to protect the corporate interests (see *Cicero Ind. Dev. Corp. v Roberts*, 63 Misc 2d 565), especially where it appears that, by resolution dated April 24, 1980, the board of directors voted to authorize the instant lawsuit (see *Byers v Baxter*, 69 AD2d 343; see, also, Business Corporation Law, § 701). Thus, even if initially unauthorized, it would appear that this subsequent resolution would serve to ratify the earlier action taken by the corporate president. In the atlernative, defendants maintain that a by-law of the corporate plaintiff, which states, *inter alia*, that "At all meetings of [the] stockholders, all questions ... shall be determined by a unanimous vote of the stockholders", required the unanimous consent of the plaintiff corporation's shareholders in order to institute this action. We cannot agree. By statute, any restriction on the powers of the board of directors must be placed in the certificate of incorporation (Business Corporation Law, §§ 701, 620, subd [b]), so that a by-law would be ineffective to shift this managerial prerogative into the hands of the shareholders (Business Corporation Law, § 601, subd [c]; see *Model, Roland & Co. v Industrial Acoustics Co.*, 16 NY2d 703). Moreover, it is extremely doubtful whether the cited by-law can be read in the manner which defendants suggest. Finally, but not least importantly, this by-law would appear to be ineffective in any event, as subdivision (b) of section 614 and section 616 (subd [a], par [2]) of the Business Corporation Law prohibit the requirement of a greater than majority vote by the shareholders for the transaction of corporate business unless the certificate of incorporation so provides (see *Model, Roland & Co. v Industrial Acoustics Co., supra)*. Accordingly, since there is no parallel provision in the corporate plaintiff's certificate of incorporation, the statutory norm of majority voting would appear to be applicable herein (Business Corporation Law, § 614, subd [b]). As the corporate president possessed the requisite authority to commence the instant lawsuit, so much of the determination of Special Term as is based upon a contrary conclusion must be reversed. In addition, the complaint adequately states a cause of action for relief under article 15 of the Real Property Actions and Proceedings Law (cf. RPAPL 1501, 1515; *Guggenheimer v Ginsburg*, 43 NY2d 268, 275). In our view, plaintiffs' motion for a preliminary injunction should be granted in order to preserve the *status quo* during the pendency of the action.

Mangano, J. P., Gibbons, Gulotta and O'Connor, JJ., concur.

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Exhibit 13

6 Misc.3d 600
Civil Court, City of New York,
New York County.

LONDON TERRACE TOWERS, INC., Petitioner,
v.
Michael DAVIS, Respondent.

Dec. 6, 2004.

Synopsis

Background: Cooperative corporation initiated holdover proceeding, seeking possession of apartment of shareholder-tenant whose tenancy had been terminated for objectionable conduct.

[Holding:] The Civil Court, City of New York, New York County, Gerald Lebovits, J., held that vote by cooperative corporation board of directors to terminate shareholder-tenant's lease based on objectionable conduct was entitled to business-judgment deference.

Judgment for petitioner.

West Headnotes (6)

[1] **Common Interest Communities**
Governing board; members, directors, and officers; committees

Vote by cooperative corporation's board of directors to terminate shareholder-tenant's lease based on objectionable conduct was entitled to business-judgment deference; thus, court could not decide whether board's decision was supported by competent evidence.

McKinney's RPAPL § 711, subd. 1.

1 Cases that cite this headnote

[2] **Courts**
Previous Decisions as Controlling or as Precedents

Any statement, explanation, rationale, or observation not directly related or necessary to outcome of particular dispute before court is not binding precedent.

1 Cases that cite this headnote

[3] **Courts**
Dicta

Court from which dicta comes is important consideration when deciding what weight to give the dicta, and unanimous decision containing dicta is also more persuasive than opinion that generates concurring or dissenting opinions.

1 Cases that cite this headnote

[4] **Courts**
Highest appellate court

Lower courts must consider nonbinding statements from jurisdiction's highest court to be prophecy about what the law is.

Cases that cite this headnote

[5] **Common Interest Communities**
Involuntary termination of ownership or possession; eviction

Cooperative corporation sufficiently stated cause of action for possession of apartment of shareholder-tenant whose tenancy had been terminated for objectionable conduct; if true, behavior alleged in termination notice constituted objectionable conduct by any fair definition.

Cases that cite this headnote

[6] **Common Interest Communities**
Conditions precedent

Shareholder-tenant had sufficient notice of objectionable conduct that was basis of vote by cooperative corporation's board of directors to terminate his lease; board sent shareholder-tenant numerous written notices about his objectionable conduct asking him to correct his behavior, and termination notice annexed prior

agreement, which listed shareholder-tenant's conduct, which in turn was subject of the vote.

Cases that cite this headnote

Attorneys and Law Firms

****814** ***600** Wolf Haldenstein Adler Freeman & Herz LLP (Maria I. Beltrani of counsel), New York City, for petitioner.

The Law Project, Inc. ***601** (Helder Coelho and Susan Cohen of counsel), New York City, for respondent.

GERALD LEBOVITS, J.

I. Introduction

Petitioner cooperative corporation is the owner and landlord of a building located at 465 West 23rd Street, New York, New York. The corporation has a board of directors that oversees the building's management. On July 9, 1993, respondent, Michael Davis, leased apartment 2F and bought the shares of stock appurtenant to the apartment.

Petitioner alleges that respondent engaged in objectionable conduct throughout his tenancy. Petitioner sent numerous warnings to respondent asking him to conform his conduct to the house rules. On December 6, 2001, the board of directors and respondent entered into a written agreement in which he promised to improve his behavior. Petitioner claims that respondent's behavior worsened. On September 3, 2003, the board of directors held a special meeting to discuss whether respondent's tenancy should be terminated for objectionable conduct under paragraph 31(f) of the proprietary lease. Paragraph 31(f) provides that

> [i]f at any time the Lessor shall determine, upon the affirmative vote of two-thirds of its then Directors, at a meeting duly called for that purpose, that because of objectionable conduct on the part of the Lessee, or of a person dwelling or visiting in the Apartment, repeated after written notice from Lessor, the tenancy of the Lessee is undesirable.

Respondent attended the September 2003 special meeting. After the board members heard respondent defend himself, they unanimously voted to terminate his proprietary lease.

****815** Petitioner now seeks possession of apartment 2F as well as use and occupancy and attorney fees. Petitioner moves for summary judgment, alleging that no issue of fact exists about whether the board voted properly to terminate respondent's tenancy. Respondent, on the other hand, argues that the board's vote is entitled to no deference under the business-judgment rule. He argues, principally, that only a court, after a trial, can decide whether he engaged in objectionable conduct. He does not suggest, however, that the board vote was outside the scope of its authority, that the board's decision was invalid or made in ***602** bad faith, or that in voting as it did the board did not further the cooperative's corporate purpose.

Given the board vote in this case, the court is called upon in this holdover proceeding to resolve an issue on which it reserved decision in *13315 Owners Corporation v. Kennedy,* 4 Misc.3d 931, 782 N.Y.S.2d 554 [Hous. Part, Civ. Ct., N.Y. County 2004]. The court in *Kennedy* debated whether a trial court must adhere to the Court of Appeals's dictum in *40 West 67th Street v. Pullman,* 100 N.Y.2d 147, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [2003] that a vote of the cooperative's board of directors, rather than only a shareholder vote, is entitled to business-judgment deference that a shareholder-tenant is objectionable. (*See Kennedy,* 4 Misc.3d at 939–943, 782 N.Y.S.2d 554.) The *Kennedy* court opined that *Pullman's* language that a cooperative board can terminate a tenancy is dictum because *Pullman* was based on a shareholder vote, not a board vote (*see id.* at 939, 782 N.Y.S.2d 554), and because *Pullman* was an eviction case, whereas the cases on which it relied were not (*see id.* at 940, 782 N.Y.S.2d 554, citing Keith E. Sealing, 2002–2003 Survey of New York Law, *Real Property Law,* Syracuse L. Rev.1359, 1374 [2004]).

Because the board in *Kennedy* did not give the shareholder-tenant proper notice or a fair opportunity to be heard (*id.* at 948–949, 782 N.Y.S.2d 554), did not vote in good faith (*id.* at 943, 782 N.Y.S.2d 554), and acted outside the scope of its authority (*id.*), the court found that the cooperative corporation was not entitled to *Pullman* deference (*see id.* at 949–950, 782 N.Y.S.2d 554). The *Kennedy* court therefore did not allow the cooperative board's vote terminating the shareholder's tenancy to satisfy the RPAPL 711(1) competent-evidence standard necessary to obviate a court's

independent determination of objectionability. (*See id.* at 950, 782 N.Y.S.2d 554.) The *Kennedy* court for that reason did not decide whether *Pullman* applies only to shareholder votes. (*See id.* at 943, 782 N.Y.S.2d 554.) Instead, the *Kennedy* court reached *Pullman's* second prong: whether, assuming that a board has the power to terminate a tenancy, the shareholder-tenant's conduct was objectionable. (*See id.* at 950, 782 N.Y.S.2d 554.) In *Kennedy,* the court concluded that any decision on the shareholder-tenant's objectionability required a trial. (*See id.* at 951, 782 N.Y.S.2d 554.)

In this proceeding, as opposed to *Kennedy,* the board vote finding the shareholder-tenant objectionable was made validly, in good faith, and within the scope of the board's authority. The court must accordingly determine whether a cooperative board has the authority to terminate a shareholder-tenant's tenancy or whether a shareholder-tenant has the right to have a court rather than a board decide that question. This court must accord great weight to the Court of Appeals's language in *Pullman,* ***603** albeit dicta, that a board's vote to terminate a proprietary lease must receive business-judgment deference. The court finds, therefore, that the board's vote to terminate respondent's proprietary lease is dispositive. Thus, the court may ****816** not decide whether competent evidence of the shareholder-tenant's alleged objectionable conduct exists to support the board's terminating his tenancy under RPAPL 711(1). In this case, the board's vote itself provides that competent evidence. As such, summary judgment must be granted to petitioner cooperative.

II. The Facts

A. Petitioner's Warnings to Respondent About his Behavior

Petitioner alleges that respondent has engaged in objectionable conduct for many years and has refused, despite written warnings required by paragraph 31(f) of the proprietary lease, to abide by the cooperative's rules of conduct.

On November 12, 1993, four months after respondent's tenancy began, petitioner sent him a letter asking him to stop playing his stereo at an unreasonably loud volume level. (*See* Petitioner's Notice of Motion to Dismiss Respondent's Objections in Point of Law and for Summary Judgment at Exhibit D.) On January 7, 1994, petitioner sent respondent a letter asking him to stop slamming his doors and playing his television and stereo loudly after 11:00 p.m. (*Id.*) On August 19, 1999, petitioner's managing agent, the Insignia Residential Group (Insignia), sent respondent a letter pleading with him to leave a copy of his key with the lobby attendant so that he could be let into his apartment when he locks himself out. (*Id.*) On March 29, 2000, Insignia sent respondent a letter to ask him to stop using the stairwell and hallway around his apartment to store his personal belongings. (*Id.*). In the same letter, Insignia warned respondent of the security risk he created when he rigged the second floor stairwell doors to remain unlocked after they closed. (*Id.*) On October 11, 2000, petitioner's lawyers sent respondent a letter to ask him to stop leaving his personal property in the common hallways, to stop his loud noises from 11:00 p.m. to 8:00 a.m., and, once again, to give petitioner a key to his apartment. (*Id.*) On June 30, 2003, petitioner sent respondent a letter banning him from the laundry room, health club, and sundeck because he allegedly stole from residents who used these facilities. (*Id.* at Exhibit H.)

Petitioner's staff also lodged numerous complaints against respondent. For example, the building superintendent complained that respondent locked himself out of his apartment from two ***604** to four times a month from 1997 to 1999, often requiring staff to open his door from 11:00 p.m. to 8:00 a.m. (*see id.* aT exhibit D.)

In addition to the behavior listed in the letters petitioner sent to respondent, petitioner alleges in its motion for summary judgment that respondent engaged in other objectionable conduct during the past 11 years. According to petitioner, respondent spray-painted furniture in the hallway and stairwell and left the furniture there to dry. (*Id.* at Affidavit of Nancy Frawley in Support of Petitioner's Summary Judgment Motion ¶ 8, at 3.) Petitioner contends that respondent allowed two fires to conflagrate in his apartment. (*Id.* at ¶ 9, at 3.) Petitioner asserts that respondent had loud guests after hours and would get into loud fights with them. (*Id.*) Petitioner claims that one fight got so loud that the police had to restore order. (*Id.*) Petitioner also alleges that while trying to unclog a neighbor's drain, its workers were almost pricked by used hypodermic needles they unsuspectingly found in respondent's sink drain. (*Id.*)

Respondent does not deny the objectionable conduct that petitioner alleges he committed. Thus, respondent does not deny that fires flamed in his apartment. In his affidavit in opposition, respondent ****817** contends simply that petitioner has not presented this court with objective evidence supporting the fires. (*See* Respondent's Affidavit in

Opposition to Petitioner's Motion for Summary Judgment ¶ 5, at 2.) Respondent does not deny that the police had to be called to restore order after a fight broke out among his guests and himself. Respondent points out only that petitioner has not given the court the police report from the incident. (*Id.*) Respondent denies knowing that syringes were in the drainpipes he shares with the neighbor, but does not deny that the syringes were his. (*Id.* at ¶ 6, at 2.) Respondent simply expresses frustration that the building staff damaged his sink trap when they tried to unclog his neighbor's sink and that petitioner never repaired the damage. (*Id.*)

B. Giving Respondent a Second Chance

On May 31, 2001, the board sent respondent a notice of objectionable conduct advising him that if his disruptive behavior continued, it will consider terminating his lease. (Petitioner's Notice of Motion to Dismiss Respondent's Objections in Point of Law and for Summary Judgment at Exhibit E.) Specifically, the board asked that him to stop obstructing the common hallways, creating loud disturbances after 11:00 p.m., using the public elevators instead of the service elevators to move furniture, and spray-painting furniture in the stairwells. (*Id.*) The board called ***605** for a special meeting to be held on August 22, 2001, to decide whether respondent's proprietary lease should be terminated. Paragraph 31(f) of respondent's proprietary lease allows petitioner's board of directors to call a special meeting of the board to terminate a shareholder-tenant's tenancy by an affirmative vote by two-thirds of the directors. (*Id.* at Exhibit C, at H–34.) Respondent attended the August 2001 meeting and defended himself against the board's charges of continued objectionable behavior. According to the minutes of the meeting, the board voted unanimously to terminate respondent's tenancy for objectionable behavior. (*See id.* at Exhibit F.)

After the unanimous board vote, respondent implored the board to give him another chance to correct his behavior. The board agreed. As a condition of allowing respondent a final opportunity to stop his objectionable behavior, the board asked him to sign an agreement to acknowledge his past behavior and to agree to abide by the house rules.

Respondent signed the agreement on December 6, 2001. (*Id.* at Exhibit G). He admitted a variety of conduct in the agreement: that he obstructed the common hallways of the building by leaving his bicycle and other equipment there, that he used the building's laundry facilities to clean rugs and other items as part of his business, that loud noises regularly emanated from his apartment after 11:00 p.m., that he continually allowed his dog to roam the hallways without a leash, and that he roamed the public hallways semi-naked. (*Id.*)

According to petitioner, the December 2001 agreement did not result in a cessation of objectionable conduct. The board called a special meeting, for September 2003, to decide once again whether to terminate respondent's tenancy.

C. The Special Meeting of September 3, 2003

Petitioner alleged in a notice sent to respondent that he failed to comply with the December 2001 agreement to conform his conduct to the house rules. The notice told respondent that the board of directors had scheduled a special meeting to decide whether to terminate his proprietary lease. ****818** The notice informed respondent that he could bring an attorney to represent him at the meeting. The meeting took place in the apartment building on September 3, 2003. Attending the meeting were, all eight members of the board of directors, petitioner's attorney, a representative from Insignia, and respondent. Respondent chose not to seek counsel for the meeting. The board tape recorded the meeting and later had the tape transcribed. The transcript ***606** is 26 pages long, not including the board's deliberations. (*See* Petitioner's Reply Affirmation at Exhibit M.)

The special meeting was structured so that the board advised respondent of the behavior to which it objected and then the board gave respondent the opportunity to answer the allegations. The board first listed the behavior that respondent acknowledged in the December 2001 agreement. (*See id.* at 3–5.) The board then detailed the new items that the board accused respondent of committing. (*See id.* at 5–8.) The board at one point granted respondent's request to adjourn the meeting for a few minutes so that he could get physical evidence to present to the board. (*See id.* at 23.) The board voted to terminate respondent's tenancy after it gave him a full and fair opportunity to address all the allegations fully.

According to the board, respondent allowed his dog to run around without a leash at least eight times. (*See id.* at 5.) The board accused one of respondent's guests of setting off an alarm on the roof of the building. (*See id.* at 5–6.) The board alleged that respondent continued to slam his doors and the stairwell door and that he created loud noises in his apartment at night. (*See id.* at 6.) The board informed respondent that a resident of the building called the police to report that he was harassing her. (*See id.* at 6.) The board further told

respondent that two employees saw him on camera stealing another person's laundry out of the laundry room. (*See id.* at 7–8.) The board then recounted the events of August 14, 2003, the night of the electrical blackout. According to the board, respondent that night set up a table in the hallway outside his apartment, lit candles, and continuously slammed his apartment door, waking up his neighbors. (*See id.* at 7–8.) The board additionally accused respondent of taking a homeless man with him to use the showers in the building's health club on June 25, 2003. (*See id.* at 6–7.) The club attendant refused to admit respondent and his guest because respondent did not have valid passes to gain access to the health club. But respondent and his guest sneaked into the showers anyway, where they were allegedly seen having sexual relations together. (*See id.* at 7.)

The board let respondent try to refute the board's claims and explain his conduct. Respondent chose to refute only some of the allegations. He took time to address one of the allegations he acknowledged in his December 2001 agreement. In that agreement, he admitted that he once walked through the public hallways in a state of undress. Respondent stated at the ***607** September 2003 meeting that although he had left his apartment wearing only a shirt and one sock, he did so unintentionally because he was sleep-walking. (*See id.* at 4.)

In response to the board's allegations that he let his dog roam the public hallways without a leash, he stated that his dog is well behaved. (*See id.* at 8.) Respondent then argued that it was a mischaracterization to state that his dog roamed around, because the dog never left his floor. (*See id.* at 9.) Respondent also tried to explain the events of the August 2003 blackout. He stated that he had lit a candle in the hallway and needed several ****819** times to come out into the hallway to light another candle he had in his apartment so that he could see into his apartment. (*See id.* at 9–10.) Respondent claimed that he needed the candle in his apartment to place a leash on his dog to take it for a walk. (*See id.* at 9.) Respondent denied slamming his doors after 11:00 p.m. (*See id.* at 13.)

Respondent addressed the accusation that he stole from the laundry room. He explained that he found a jacket in a puddle in the laundry room and assumed that someone had thrown it away. (*See id.* at 11.) Respondent denied removing the jacket from the laundry room. (*Id.*) He said he left it hanging on a doorknob. (*Id.*)

Respondent spent a significant amount of time responding to the board's accusation that he engaged in sexual relations in the health club's shower. Respondent stated that he was entitled to use the showers. According to respondent, he had guest passes that he paid for. (*See id.* at 10–11.) Respondent explained that his homeless guest had a foul odor and needed to shower. (*See id.* at 10.) Respondent adamantly denied having sex with his guest in the shower. (*See id.* at 13.) Respondent admitted that they were naked in the same shower at the same time, but he explained that he was merely trying to free an ingrown hair from his guest's back. (*See id.*)

To test respondent's honesty, the board members halted the meeting so that he could go to his apartment to bring back the guest passes he used to gain access to the health club. (*See id.* at 22–24.) When respondent returned to the meeting with the passes, the board members inspected them and noted that they expired in 1994 (*see id.* at 24) and thus were invalid for admission to the health club. When a board member asked respondent why he did not shower with the homeless man in his apartment, he replied that his apartment was a mess and he did not want to bring a stranger near his dog. (*See id.* at 13.)

***608** The board listened to respondent' explanations, arguments, and excuses but ultimately found them unpersuasive. The board unanimously passed a corporate resolution to terminate respondent's tenancy. (*See* Petitioner's Notice of Motion to Dismiss Respondent's Objections in Point of Law and for Summary Judgment at Exhibit I.) The resolution states that respondent's proprietary lease is terminated for repeated instances of objectionable conduct after the board notified respondent in writing of its objection to his conduct. (*Id.*) On September 16, 2003, the board served a notice of termination on respondent stating that the board had unanimously voted to terminate his proprietary lease because he violated the agreement of December 6, 2001. (*See id.* at Exhibit J.) The notice of termination advised respondent that his lease would terminate on September 30, 2003. On October 24, 2004, petitioner commenced this holdover proceeding. Petitioner now moves for summary judgment.

III. Summary Judgment

Summary judgment will be granted if the movant establishes that no triable issues of fact exist. (*See Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974].) Once the party seeking summary judgment shows entitlement, the party opposing the motion must come forward with admissible proof establishing the existence of triable issues of fact or demonstrate an acceptable excuse for

its failure to do so. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980].) When faced with a motion for summary ****820** judgment, the court must view the evidence in the light most favorable to the nonmoving party and give the nonmoving party all the reasonable inferences that can be drawn from the evidence.

(*Negri v. Stop & Shop, Inc.*, 65 N.Y.2d 625, 626, 491 N.Y.S.2d 151, 480 N.E.2d 740 [1985].)

The parties disagree about what petitioner must prove to prevail on summary judgment. Respondent argues that petitioner must prove to the court that he committed objectionable conduct. Petitioner argues that the board's vote to terminate respondent's tenancy is entitled to business-judgment deference. Petitioner contends that it is unnecessary on this motion for summary judgment to prove that respondent engaged in the objectionable conduct. Petitioner contends that a valid board vote is all the proof of respondent's objectionable conduct necessary to establish its case for possession. This court turns to the Court of Appeals's *Pullman* decision for guidance.

IV. The *Pullman* Decision

In *40 West 67th Street v. Pullman*, a cooperative sought to recover possession from Pullman, a shareholder-tenant who engaged in ***609** objectionable conduct that eventually led to the termination of his tenancy. (*See* 100 N.Y.2d at 150, 760 N.Y.S.2d 745, 790 N.E.2d 1174.) Pullman sued his neighbors, called the police against his neighbors, altered his apartment without permission, distributed flyers in the building that accused a neighbor of being mentally unstable, and accused other neighbors of being unfaithful to their spouses. (*Id.* at 150–151, 760 N.Y.S.2d 745, 790 N.E.2d 1174.) The shareholders held a meeting to decide whether to pass a resolution ordering the board of directors to terminate Pullman's tenancy. (*Id.* at 152, 760 N.Y.S.2d 745, 790 N.E.2d 1174.) At the meeting, shareholders representing a supermajority of the shares were present; Pullman did not attend. (*Id.*) The shareholders voted 2048 shares to 0 to terminate Pullman's tenancy. (*Id.*)

When Pullman did not vacate the apartment, the cooperative brought an ejectment action in Supreme Court based on the shareholder vote. Supreme Court denied the cooperative's motion for summary judgment. (*Id.*) On appeal, the Appellate Division, First Department, reversed the Supreme Court's decision and order denying petitioner's motion for summary judgment. (*See 40 W. 67th St. v. Pullman*, 296 A.D.2d 120, 742 N.Y.S.2d 264 [1st Dept. 2002].) The First Department held that the shareholders' vote was entitled to deference under the business-judgment rule. (*See id.* at 124, 742 N.Y.S.2d 264.) Pullman appealed, and the Court of Appeals found for the cooperative. (*See* 100 N.Y.2d at 158, 760 N.Y.S.2d 745, 790 N.E.2d 1174.)

The *Pullman* Court relied heavily on *Levandusky v. One Fifth Avenue Apartment Corporation*, 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [1990] to apply the business-judgment rule to the cooperative's decision. The *Levandusky* Court applied that rule as the standard to review board votes in an Article 78 proceeding that challenged a cooperative board's decision to prevent a shareholder-tenant from renovating an apartment. (*See* 75 N.Y.2d at 537–538, 554 N.Y.S.2d 807, 553 N.E.2d 1317.) The *Pullman* Court's reliance on *Levandusky* is noteworthy. *Pullman* extended *Levandusky's* business-judgment deference to eviction actions and proceedings.

The *Pullman* Court held that courts should scrutinize the facts underlying a board's decision if a shareholder-tenant can show that the cooperative acted (1) outside the scope of its authority, (2) in a ****821** way that did not legitimately further the corporate purpose, or (3) in bad faith. (*See id.* at 155, 760 N.Y.S.2d 745, 790 N.E.2d 1174.) These three exceptions to the business-judgment rule balance protecting the interests of the entire cooperative community and the judiciary's interest in protecting against the board's possible abuse of its broad powers to terminate a shareholder-tenant's proprietary lease. (*Id.*) Absent proof of one or ***610** all of the three exceptions, a shareholder vote to terminate a tenancy because of the shareholder-tenant's objectionable conduct satisfies the "competent evidence" standard required by RPAPL 711(1), entitling the cooperative to summary judgment. (100 N.Y.2d at 155, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [finding that "relationships among shareholders in cooperatives are sufficiently distinct from traditional landlord-tenant relationships" and that courts should not look behind proper board votes].)

The *Pullman* case established a two-phase process of reviewing a cooperative's decision to terminate a shareholder's tenancy. (*Kennedy*, 4 Misc.3d at 938, 782 N.Y.S.2d 554.) In the first phase, the court must determine whether the cooperative's action is entitled to business-judgment deference. (*Id.*) If the business-judgment rule

applies, the court must grant summary judgment to the cooperative corporation, if the cooperative moves for it, and, otherwise, must grant a final possessory judgment after trial without requiring the cooperative corporation to prove whether the shareholder-tenant is innocent or guilty of the purported objectionable conduct. It is the shareholder-tenant's burden to show that the board vote is not entitled to deference. The shareholder-tenant will satisfy that burden by showing that the board's actions were outside the scope of its authority, that the board's actions did not further the cooperative's corporate purpose, or that the board's decision was made in bad faith. (*Pullman,* 100 N.Y.2d at 155, 760 N.Y.S.2d 745, 790 N.E.2d 1174; *Kennedy,* 4 Misc.3d at 938, 782 N.Y.S.2d 554.)

If the shareholder satisfies its burden, the court moves to phase two: an independent evaluation, from competent, admissible evidence, of whether the shareholder committed objectionable conduct. (*Kennedy,* 4 Misc.3d at 938, 782 N.Y.S.2d 554.)

V. Business–Judgment Deference for Board Votes

The business-judgment rule is a standard of reviewing business decisions that courts use to prevent judicial interference and second guessing of corporate decisions made in good faith and in furtherance of the corporate purpose. (*Levandusky,* 75 N.Y.2d at 537–538, 554 N.Y.S.2d 807, 553 N.E.2d 1317, citing *Auerbach v. Bennett,* 47 N.Y.2d 619, 629, 419 N.Y.S.2d 920, 393 N.E.2d 994 [1979].) Courts have given business-judgment deference to a wide range of cooperative board actions and decisions, although not yet to a vote to evict. (*See e.g. Horwitz v. 1025 Fifth Ave., Inc.,* 7 A.D.3d 461, 462, 777 N.Y.S.2d 482 [1st Dept. 2004, mem] [applying business-judgment deference to cooperative house rule banning awnings]; *Han Fui Hui v. Tieh Chi Ho,* 1 A.D.3d 274, 274, 767 N.Y.S.2d 582 [1st Dept. 2003, mem] [according deference to cooperative's decision to issue and sell new shares of stock to parties other than plaintiff]; *Konrad* ***611** *v. 136 E. 64th St. Corp.,* 254 A.D.2d 110, 110, 678 N.Y.S.2d 629 [1st Dept. 1998, mem] [deferring to cooperative board's decision about repairs and renovations]; *Glassmeyer v. 310 Lexington Owners Corp.,* 232 A.D.2d 229, 230, 647 N.Y.S.2d 784 [1st Dept. 1996, mem] [applying deference to cooperative board's refusal to re-allocate shares]; ****822** *Rubinstein v. 242 Apt. Corp.,* 189 A.D.2d 685, 686, 592 N.Y.S.2d 378 [1st Dept. 1993, mem] [holding that shareholder could not challenge board's adoption of rules expanding amount of time common roof garden was open]; *Cannon Point North, Inc. v. Abeles,* 160 Misc.2d 30, 33, 612 N.Y.S.2d 289 [App. Term, 1st Dept. 1993, per curiam] [applying deference to cooperative board's decision to prohibit washing machines and dryers in individual units].)

The issue in this case is whether a board vote terminating a shareholder-tenant's proprietary lease is entitled to business-judgment deference. The Court of Appeals's *Pullman* decision and this court's decision in *Kennedy* have engendered discussion about the advisability of allowing a board vote to terminate a shareholder-tenant's tenancy as opposed to requiring a full shareholder vote. (*See e.g.* Richard Siegler, *A Failure to Follow Procedure,* 205 Habitat Mag. 51 [Oct. 2004] [analyzing *Kennedy* and *Pullman*].)

Some commentators support extending business-judgment deference to board votes to terminate tenancies for objectionable conduct. (*See* Menachem J. Kastner and Jarred Kassenoff, *Re–Examining 'Pullman': The Threshold Dilemma,* N.Y.L.J., Sept. 15, 2004, at 4, col. 4 [hereinafter *The Threshold Dilemma*] [discussing *Kennedy* and arguing that board votes to terminate tenancies are entitled under *Pullman* to same deference as shareholder votes]; *accord* Menachem J. Kastner and Jarred I. Kassenoff, *Cooperatives Authorized to Use Business Judgment Rule in Terminating Shareholder Leases,* 75 NY St BJ 32, 38 [July/Aug. 2003].) Those who support extending business-judgment deference to board votes argue that no principled ground distinguishes shareholder votes from board votes. (*See e.g. The Threshold Dilemma, supra,* at 4, col. 4.) In this regard, some contend that boards that follow the cooperative's procedure are entitled to business-judgment deference. (*See e.g.* Kenneth J. Finger & Carl L. Finger, *Pullman Revisited—Examining An Important Realty Ruling,* 5 Impact: Realty News Digest 2 [Sept./Oct. 2004] [discussing *Kennedy* and advising cooperative boards to follow proper voting procedures, to review notices scrupulously, and to afford fundamental fairness to shareholder-tenants whose tenancy board is considering terminating].)

***612** Other commentators have voiced concerns about allowing only a board vote to terminate a shareholder's tenancy. (*See e.g.* Scott E. Molen, *Realty Law Digest,* N.Y.L.J., Oct. 6, 2004, at 5, col. 1 [analyzing *Kennedy* and arguing that giving cooperative boards too much power might diminish value of cooperatives and make getting a mortgage for them much more difficult].) In *Kennedy* itself, this court noted that those who oppose granting business-judgment deference to board votes are ultimately concerned

with eroding tenant protection. (*See Kennedy,* 4 Misc.3d at 941, 782 N.Y.S.2d 554, citing John Caher, *Co-op Boards Given Broad Power to Evict: Business Judgment Rule Applies to Terminations,* N.Y.L.J., May 14, 2003, at 1, col. 3; Joel E. Miller, *Court of Appeals Holds Courts Powerless to Review Cooperative's Factual Findings,* 32 N.Y. Real Prop. L.J. 4, 8 [2004]; Vincent Di Lorenzo, *The Business Judgment Rule and Fiduciary Obligations Are Applied to Shareholder Decisions in Cooperative Housing Corporations,* 32 N.Y. Real Prop. L.J. 10 [2004]; Steward E. Sterk, *Jurisprudence Taking Shape on Facts and Law,* N.Y.L.J., Sept. 2, 2003, at S10, col. 1.)

[1] **[2]** *Pullman* is a shareholder case, not a board case. The Court of Appeals's statements about granting business-judgment deference to board votes were not directly related to the issue before the ****823** *Pullman* Court. They are dicta. (*Kennedy,* 4 Misc.3d at 939, 782 N.Y.S.2d 554.) But this court must follow the Court of Appeals's dicta in *Pullman.* Any statement, explanation, rationale, or observation not directly related or necessary to the outcome of the particular dispute before a court is not binding precedent. (*See* Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?,* 17 Pepp. L. Rev. 605, 606 [1990] [noting that a case is important only for what was decided and not for how it was decided]; Richard B. Cappalli, *What Is Authority? Creation And Use of Case Law by Pennsylvania's Appellate Courts,* 72 Temp. L. Rev. 303, 320 [1999] [stating that court's decision on material facts combined with legal principles being applied is holding, but court's rationale helps readers understand breadth of holding]; Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case,* 40 Yale L.J. 161, 162 [1930] [arguing that judge's reason for decision is never binding part of precedent].) Dicta or no, however, the Court of Appeals's reasoning in *Pullman* applies here and is persuasive.

[3] **[4]** The court from which the dicta comes is an important consideration when deciding what weight to give the dicta. In this case, the source of the dicta is the highest court in New ***613** York State. A unanimous decision containing dicta is also more persuasive than an opinion that generates concurring or dissenting opinions. In *Pullman,* the Court of Appeals stated unanimously that board votes are entitled to deference under the business-judgment rule. The number of times a court states a rule affects whether the dicta is a casual remark. In deciding that shareholders votes to terminate a shareholder's tenancy are entitled to deference, the Court of Appeals referred 14 times to granting deference, under the business-judgment rule, to proper board votes to terminate tenancies. Lower courts must consider nonbinding statements from a jurisdiction's highest court to be a prophecy about what the law is. (*McCalla v. Royal MacCabees Life Ins. Co.,* 369 F.3d 1128, 1132 [9th Cir.2004] [treating United States Supreme Court dicta as "prophecy" on how it will decide future cases].) The *Pullman* dicta is a prophecy from the Court of Appeals that board votes to terminate a shareholder-tenant's tenancy are entitled to deference.

Courts ought not ignore an in-depth evaluation by the Court of Appeals. (*See Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union of Brooklyn and Queens,* 47 N.Y.S.2d 772, 777 [Sup. Ct., Kings County 1944] [stating that lower courts cannot ignore Court of Appeals's thorough evaluations of an issue].) The *Pullman* Court recognized that cooperative shareholders voluntarily share control over who lives in the cooperative community. (*See Pullman,* 100 N.Y.2d at 158, 760 N.Y.S.2d 745, 790 N.E.2d 1174.) The *Pullman* Court also recognized that the board represents the interests of the collective. (*See id.* at 154, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [quoting *Levandusky* that boards protect cooperative-community's interests].) The *Pullman* Court recognized the concerns of limiting judicial review of board decisions, but the Court articulated with unambiguous clarity that procedurally proper cooperative board votes that terminate a shareholder's tenancy for objectionable conduct are entitled to deference under the business-judgment rule. (*See id.* at 153–154, 159, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [noting that courts must exercise "heightened vigilance" when faced with board votes to terminate proprietary leases].) Allowing boards to terminate cooperative tenancies might affect the value of cooperatives. But cases cannot be decided on market forces. Market forces have no force of law. The court must ****824** apply Court of Appeals's reasoning in deciding petitioner's motion for summary judgment.

VI. Notice of Objectionable Conduct

Petitioner's motion to dismiss respondent's first, second, and third objections in point of law is granted. Respondent does not ***614** suggest that the board's decision was outside the scope of the board's authority, that the vote was invalid, or that the vote was made in bad faith, and the court on its own review has found none of that. Respondent instead raises three defenses. Respondent argues in his first objection in point of law that this court lacks subject-matter jurisdiction because, he claims, petitioner failed properly to allege the facts of this cause of action. Respondent in his second objection in

point of law argues the petition should be dismissed because, he claims, petitioner did not adequately specify the alleged objectionable behavior in the termination notice. Respondent argues in his third objection in point of law that the allegations in the termination notice of do not constitute a nuisance.

[5] The court rejects these defenses. Petitioner has sufficiently stated a cause of action. The termination notice specified the alleged behavior; it listed, in detail, respondent's objectionable conduct and annexed the December 2001 agreement. The allegations, if true, constitute objectionable conduct by any fair definition. In any event, the board vote is competent evidence of respondent's objectionable behavior. (*See Pullman,* 100 N.Y.2d at 155, 760 N.Y.S.2d 745, 790 N.E.2d 1174.) Whether allegations of objectionable conduct contained in and annexed to a termination notice are specific enough to enable a respondent to mount a defense to allegations of misconduct is relevant only if a board's vote is entitled to no deference.

Paragraph 31(f) of the proprietary lease allows a cooperative corporation to terminate a proprietary lease if a shareholder-tenant continues to commit objectionable conduct after the shareholder receives written notice of objectionable conduct. The specificity of the allegations in the termination notice in question are relevant, therefore, in a context that respondent never argued. A termination notice must be specific so that a court may compare the allegations in the initial written notices complaining about objectionable conduct with the allegations in special-meeting notice accusing the shareholder of engaging in the conduct again and with the allegations in and annexed to the termination notice. A comparison is necessary to ensure that the shareholder has notice before a special meeting of the alleged objectionable conduct that might form the basis to terminate a proprietary lease. Having that notice assures due process and an opportunity to defend. A comparison is also necessary to ensure that the board voted on the same repeated misconduct about which the shareholder had received prior written notice.

[6] *615 Here, petitioner sent respondent numerous written notices about his objectionable conduct asking him to correct his behavior. The termination notice annexes the December 2001 agreement, which lists respondent's conduct, which in turn was the subject of the September 2003 special meeting. Thus, the termination notice specifies the repeated objectionable conduct that was the subject of the corporate resolution and about which respondent was previously warned in writing, all as required by paragraph 31(f) of the proprietary lease and all as required by a strict reading of *Pullman's* heightened-vigilance standard.

**825 VII. Conclusion

Petitioner's motion for summary judgment is granted. This court is under a directive from the Court of Appeals to ensure the good faith of cooperative decisions to terminate a shareholder's tenancy. (*See id.* at 157, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [warning courts that business-judgment deference may not be used to rubber-stamp board's decision].) But the board's decision is entitled to business-judgment deference, even construing all the facts in favor of respondent, the nonmoving party.

A properly elected board acted within its authority and according to the proprietary lease to terminate respondent's tenancy. The board gave respondent proper notice of its proposed action. The board provided respondent with a forum to dispute the claimed objectionable behavior. After respondent acknowledged his behavior in writing and agreed to change, the board gave respondent one more last chance to conform his conduct to the cooperative community's standards. When he failed to comply with the agreement, the board gave him another notice of objectionable conduct and asked him to appear for a special meeting. With that notice and an opportunity to be heard, respondent appeared and defended himself against the board's allegations. The board listened but found him unconvincing. After unanimously voting to terminate his tenancy, following a hearing fully transcribed to assure that the board would act with integrity, the board passed a corporate resolution and sent respondent a notice to terminate his tenancy. Here, as in *Pullman,* the "cooperative unfailingly followed the procedures contained in the [proprietary] lease to terminate [respondent's] tenancy." (*Id.* at 156, 760 N.Y.S.2d 745, 790 N.E.2d 1174.) Petitioner is entitled to judgment on the papers.

Final judgment for petitioner.

This opinion is the court's decision and order.

All Citations

6 Misc.3d 600, 790 N.Y.S.2d 813, 2004 N.Y. Slip Op. 24497

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Exhibit 14

3 N.Y.2d 572
Court of Appeals of New York.

In the Matter of the Arbitration between
PALOMA FROCKS, Inc., Respondent,
v.
SHAMOKIN SPORTSWEAR
CORPORATION, Appellant.

Jan. 16, 1958.

Synopsis

Proceeding in the matter of the application of a corporation for an order staying an arbitration commenced by another corporation. The Appellate Division of the Supreme Court in the First Judicial Department, 1 A.D.2d 640, 152 N.Y.S.2d 652, entered an order which reversed order of the Supreme Court at Special Term, Irving H. Saypol, J., entered in New York County, denying the motion for order staying the arbitration proceedings, and granted the motion and directed that the arbitration by stayed, and the defendant corporation appealed. The Court of Appeals, Desmond, J., held that where contract between two corporations included a general arbitration clause, president of one contracting party without specific authorization from his directors could commence arbitration of alleged dispute, even though half of directors of his corporation represented the other contracting party on corporation's board and presumably would not vote in favor of bringing the dispute between arbitrators.

Order of Appellate Division reversed and order of Special Term reinstated.

West Headnotes (4)

[1] **Alternative Dispute Resolution**
Proceedings

The only issues a court may deal with on application for order staying arbitration commenced pursuant to arbitration clause in contract are as to the making of the contract or submission or the failure to comply therewith, and all acts of the parties subsequent to the making of the contract which raise issues of fact or law lie exclusively within jurisdiction of the arbitrators. Civil Practice Act, § 1458.

4 Cases that cite this headnote

[2] **Corporations and Business Organizations**
Submission to arbitration

Authorization of a corporation president to agree to a general arbitration clause amounts to an authorization to president to carry on arbitrations of such disputes as may arise.

4 Cases that cite this headnote

[3] **Corporations and Business Organizations**
From customary duties or acts or nature of office

Where there has been no direct prohibition by board of directors, corporate president has presumptive authority, in discharge of his duties, to defend and prosecute suits in name of the corporation.

13 Cases that cite this headnote

[4] **Corporations and Business Organizations**
Submission to arbitration

Where contract between two corporations included a general arbitration clause, president of one of the contracting parties without specific authorization from his directors could commence arbitration of alleged dispute, even though half of directors of his corporation represented the other contracting party on corporation's board and presumably would not vote in favor of bringing the dispute before arbitrators.

11 Cases that cite this headnote

Attorneys and Law Firms

***510 **780 *573** Harold M. Foster, New York City, for appellant.

Seymour J. Ugelow, New York City, for respondent.

Opinion

DESMOND, Judge.

[1] The question for decision is: when a contract between two corporations includes a general arbitration clause, may the president of one contracting party without *574 specific authorization from his directors commence an arbitration of an alleged dispute, when half of the directors of his corporation represent the other contracting party on his corporation's board and presumably would not vote in favor of bringing the dispute before arbitrators? We could avoid answering that query by holding that it is for the arbitrators to answer, and thus not a proper basis for a court-granted stay of arbitration. The only issues a court may deal with on such a stay application are as to 'the making of the contract or submission or the failure to comply therewith' (Civ.Prac.Act, s 1458; Matter of Kramer & Uchitelle, Inc., 288 N.Y. 467, 472, 43 N.E.2d 493, 495, 141 A.L.R. 1497; Western Union Co. v. American Communications Ass'n, C. I. O., 299 N.Y. 177, 86 N.E.2d 162) and 'all acts of the parties subsequent to the making of the contract which raise issues of fact or law, lie exclusively within the jurisdiction of the arbitrators' (Lipman v. Haeuser Shellac Co., 289 N.Y. 76, 80, 43 N.E.2d 817, 819, 142 A.L.R. 1088). However, neither court below dealt with this part of the problem, so we address ourselves to the issue those courts did decide, the is, the authority of the president to bring on this arbitration.

Several years ago petitioner Paloma Frocks, Inc., made a contract with appellant Shamokin Sportswear Corp. under which the latter was to perform for Paloma certain operations involved in Paloma's manufacture of dresses. Any dispute was to be determined by arbitration. The agreement was signed for Paloma by Harry Toffel, its president. George Bernstein, Shamokin's president, signed for it. Toffel not only controlled Paloma but was and is an officer and director of Shamokin also, and his brother Philip Toffel as his nominee owned half of Shamokin's stock. **781 Shamokin had four directors: the two Toffels and George Bernstein and the latter's nominee. In other words, ownership and control of Shamokin was half in Bernstein and half in the Toffels who controlled Paloma. Shamokin rendered some services to Paloma under the contract ***511 but the arrangement then came to an end and Shamokin has not since been active in business. Bernstein as president of Shamokin served on Paloma a demand that there be arbitrated a contention that Shamokin had not been paid the full compensation due it from Paloma for work on the dresses. Paloma countered with this Supreme Court proceeding in which it prayed for an order staying the proposed arbitration on the ground that it had never been authorized by Shamokin's *575 directors. Bernstein, Shamokin's president, filed an answering affidavit in which he admitted that the Shamokin directors had not acted in the matter and that a meeting of the Shamokin board would have been an 'idle gesture' since the two brothers Toffel would not have voted in favor of arbitration of a claim against Paloma.

Special Term, on the ground that Bernstein as president had implied authority, denied the stay. The Appellate Division, however, thought that under the circumstances Bernstein had no power thus to act for Shamokin. The Appellate Division's reliance for that conclusion was on Sterling Industries v. Ball Bearing Pen Corp., 298 N.Y. 483, 84 N.E.2d 790, 10 A.L.R.2d 694, but there are several important differences between this case and Sterling Industries. The first such dirrerence is this: 'Sterling's president asked his board's permission to bring the suit but there was a tie vote which this court treated as a refusal by the directors of permission (see Rothman & Schneider, Inc., v. Beckerman, 2 N.Y.2d 493, and its analysis, at page 497, 161 N.Y.S.2d 118, at page 120, of the Sterling Industries case).

[2] [3] [4] A more important difference between this case and Sterling Industries is that here Shamokin's president is merely carrying out an existing agreement that all disputes under this contract would be submitted to arbitration. Shamokin's directors agreed to that arbitration clause and authorized president Bernstein to sign the contract embodying it. They had thereby agreed in advance that Paloma-Shamokin controversies should go to arbitrators. Thus, when a dispute did arise the submission thereof by president Bernstein to arbitrators was a routine step in the performance of an authorized contract. It makes little difference whether we regard Bernstein's authority as express or implied (see Twyeffort v. Unexcelled Mfg. Co., 263 N.Y. 6, 9, 188 N.E. 138, 139; Rosbrook, New York Corporation Manual, pp. 592, 593). Authorization of a corporation president to agree to a general arbitration clause amounts to an authorization to the president to carry on arbitrations of such disputes as may arise (see, generally, Alexandria Canal Co. v. Swann, 5 How. 83, 89, 12 L.Ed. 60; Gorham v. Gale, 7 Cow. 739, 744; Wood v. Auburn & Rochester R. Co., 8 N.Y. 160, 166). We do not suggest that the board of directors could not forbid a particular arbitration but there was no prohibition here. Even as to lawsuits, 'Where there has

been no direct ***512 prohibition by the board * * * the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the *576 corporation' (Rothman & Schneider v. Beckerman, 2 N.Y.2d 493, 497, 161 N.Y.S.2d 118, 121, supra).

Appellant Shamokin is a Pennsylvania corporation but neither party asserts that Pennsylvania law differs from ours in any respect which would be important here.

The order of the Appellate Division should be reversed, with costs in this court and in the Appellate Division, and the order of Special Term reinstated.

CONWAY, C. J., and DYE, FULD, FROESSEL, VAN VOORHIS and BURKE, JJ., concur.

Order reversed, etc.

All Citations

3 N.Y.2d 572, 147 N.E.2d 779, 170 N.Y.S.2d 509, 65 A.L.R.2d 1317

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Exhibit 15

167 A.D.3d 1281
Supreme Court, Appellate Division,
Third Department, New York.

In the Matter of the PEOPLE of the State of New York, BY the ATTORNEY GENERAL OF the STATE of New York, Appellant,
v.
The LUTHERAN CARE NETWORK, INC., et al., Respondents.

526214
|
Calendar Date: October 9, 2018
|
Decided and Entered: December 20, 2018

Synopsis

Background: Attorney General filed petition against not-for-profit corporation, certain of its directors, and two of its officers, seeking to enjoin the corporation from exercising unlawful operational control over its affiliates. The Supreme Court, Albany County, Ryba, J., partially dismissed the application, and Attorney General appealed.

Holdings: The Supreme Court, Appellate Division, Rumsey, J., held that:

[1] injunction enjoining corporation from exercising operational control over any affiliate in a manner inconsistent with purposes of the affiliate or in violation of law was not required;

[2] genuine issues of material fact as to whether corporation violated its duty to affiliate by improperly utilizing affiliate's surplus to benefit corporation and its other affiliates and by engaging in related party transactions that were not in affiliate's best interest precluded summary determination on Attorney General's petition; and

[3] issues of fact precluded application of the business judgment rule.

Affirmed as modified.

Procedural Posture(s): On Appeal; Judgment.

West Headnotes (8)

[1] Injunction
Pleadings and affidavits as evidence

When ruling on Attorney General's petition to enjoin not-for-profit corporation from exercising unlawful operational control over its affiliates, affirmation from assistant attorney general who investigated the corporation, which had 60 annexed exhibits, comprised of copies of documents that had been obtained pursuant to subpoena and deposition transcripts, could not be disregarded on basis that it was made by an attorney who had not established that she was qualified to render an opinion; as a result, Supreme Court improperly disregarded evidence contained in the exhibits, which served as vehicle for submission of documentary evidence.

Cases that cite this headnote

[2] Injunction
Management of affairs or business in general

Injunction enjoining not-for-profit corporation from exercising operational control over any affiliate in a manner inconsistent with the purposes of the affiliate or in violation of law was not required, where the corporation had implemented procedures to ensure future compliance with applicable law, and there was no indication that it would not follow the law in the future.

Cases that cite this headnote

[3] Corporations and Business Organizations
Extent and exercise of powers in general

Not-for-profit corporation could not operate its affiliate in a manner inconsistent with the affiliate's purpose, or engage in related party transactions without complying with the relevant provisions of the Not–For–Profit Corporation Law, where the affiliate was an independent corporation. N.Y. Not-for-Profit Corp. Law § 508.

Cases that cite this headnote

[4] **Judgment**
Stock and stockholders, cases involving

Genuine issues of material fact as to whether not-for-profit corporation violated its duty to affiliate that operated senior living facility by improperly utilizing affiliate's surplus to benefit corporation and its other affiliates and by engaging in related party transactions that were not in affiliate's best interest precluded summary determination of Attorney General's petition to enjoin the corporation from exercising unlawful operational control over affiliates. N.Y. Not-for-Profit Corp. Law §§ 508, 715.

Cases that cite this headnote

[5] **Attorney General**
Bringing and prosecution of actions

Corporations and Business Organizations
Property and conveyances

The Attorney General is authorized to seek rescission of related party transactions made in violation of the Not–For–Profit Corporation Law, and may compel an accounting of corporate assets that were improperly transferred and seek to set aside such transactions. N.Y. Not-for-Profit Corp. Law §§ 715(f), 720(a), (b).

Cases that cite this headnote

[6] **Corporations and Business Organizations**
Business judgment rule in general

The "business judgment rule" provides that, where corporate officers or directors exercise unbiased judgment in determining that certain actions will promote the corporation's interests, courts will defer to those determinations if they were made in good faith.

1 Cases that cite this headnote

[7] **Corporations and Business Organizations**
Business judgment rule in general

Corporations and Business Organizations
Conflicts of Interest and Self-Dealing in General

The business judgment rule has no place where corporate officers or directors take actions that exceed their authority under relevant corporate bylaws, or where they make decisions affected by an inherent conflict of interest.

1 Cases that cite this headnote

[8] **Injunction**
Directors, officers, and agents

Issues of fact regarding whether not-for-profit corporation exceeded its authority by improperly utilizing affiliate's surplus to benefit corporation and its other affiliates and by engaging in related party transactions that were not in affiliate's best interest precluded application of the business judgment rule when ruling on Attorney General's petition to enjoin the corporation from exercising unlawful operational control over affiliates. N.Y. Not-for-Profit Corp. Law §§ 508, 715.

Cases that cite this headnote

Attorneys and Law Firms

**155 Barbara D. Underwood, Attorney General, Albany (Jonathan D. Hitsous of counsel), for appellant.

Carter, Conboy, Case, Blackmore, Maloney & Laird, PC, Albany (Michael J. Murphy of counsel) and O'Connell & Aronowitz, PC, Troy (Daniel J. Tuczinski of counsel) and Stradley Ronon Stevens & Young, LLP, Washington, DC (Mark Chopko admitted pro hac vice), for The Lutheran Care Network, Inc. and others, respondents.

Dreyer Boyajian LLP, Albany (Joshua R. Friedman of counsel), for Frank R. Tripodi and another, respondents.

Before: McCarthy, J.P., Devine, Mulvey, Rumsey and Pritzker, JJ.

MEMORANDUM AND ORDER

Rumsey, J.

*1281 Appeal from a judgment of the Supreme Court (Ryba, J.), entered March 30, 2017 in Albany County, which partially dismissed petitioner's application, in a proceeding pursuant to CPLR article 4, to, among other things, enjoin respondent The Lutheran Care Network, Inc. from exercising unlawful operational control over its affiliates.

Respondent The Lutheran Care Network, Inc., formerly known as Wartburg Lutheran Services, Inc. (hereinafter TLCN), is a New York not-for-profit corporation that does not directly deliver any **156 services; rather, it acts through several not-for-profit corporations of which it is the sole member (hereinafter affiliates), including Coburg Village, Inc., which operates a private-pay senior living facility in the Town of Clifton *1282 Park, Saratoga County. In 2014, the Board of Directors of TLCN voted to replace the members of the Boards of Directors of Coburg and TLCN's other affiliates with members of TLCN's own Board of Directors. Later that year, a dispute between residents of the Coburg facility and TLCN representatives resulted in a complaint to the Attorney General, who began investigating Coburg and TLCN for possible violations of the Not–For–Profit Corporation Law. Petitioner, by the Attorney General, commenced this proceeding against TLCN, certain individual directors of TLCN, [1] and two of TLCN's officers – respondents Frank R. Tripodi, TLCN's chief executive officer, who was also a director, and Laraine Fellegara, TLCN's chief financial officer. The petition alleged that respondents violated state law and TLCN and Coburg bylaws by impermissibly transferring funds from Coburg to TLCN and by requiring that Coburg pay unreasonable management fees to TLCN. Among other relief, petitioner sought judgment removing respondents from exercising any control over Coburg, ordering that TLCN repay Coburg all funds found to have been illegally transferred from Coburg to TLCN, and ordering that TLCN adopt a conflict of interest policy. After respondents answered, Supreme Court directed TLCN to adopt a conflict of interest policy and otherwise dismissed the petition. Petitioner appeals.

[1] The petition asserts four causes of action and seeks relief based, as relevant here, on allegations that respondents breached their fiduciary duties to Coburg and improperly engaged in related party transactions by exercising operational control over Coburg in a manner inconsistent with its purposes and in violation of law. In a special proceeding commenced under CPLR article 4, "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" by applying the same standards that apply on a motion for summary judgment (CPLR 409[b]; *see Matter of National Enters., Inc. v. Clermont Farm Corp.*, 46 A.D.3d 1180, 1183, 848 N.Y.S.2d 420 [2007]; *Matter of People v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 106, 805 N.Y.S.2d 175 [2005], *lv dismissed* 7 N.Y.3d 741, 819 N.Y.S.2d 875, 853 N.E.2d 246 [2006]). In support of the petition, petitioner submitted an affirmation from Laura A. Sprague, the Assistant Attorney General who investigated TLCN, which had 60 exhibits annexed thereto that were comprised of copies of documents that had been obtained from respondents pursuant to subpoena and deposition transcripts. Initially, we note that Supreme Court erred by disregarding Sprague's affirmation on the basis *1283 that it was made by an attorney who had not established that she was qualified to render an opinion. By adopting this unduly narrow view of Sprague's affirmation, Supreme Court improperly disregarded the evidence contained in the numerous exhibits that were annexed to the affirmation, which, in that regard, served as a vehicle for the submission of documentary evidence (*see Warner v. Kain*, 162 A.D.3d 1384, 1385 n. 1, 79 N.Y.S.3d 362 [2018]; *State of New York v. Grecco*, 43 A.D.3d 397, 399, 840 N.Y.S.2d 149 [2007]).

**157 [2] In the first cause of action, petitioner seeks, as relevant here, an injunction enjoining TLCN from exercising operational control over any affiliate in a manner inconsistent with the purposes of the affiliate or in violation of law. [2] Respondents have denied that there is any potential for any future harm. In that regard, they assert that TLCN has implemented procedures to ensure future compliance with applicable law, thereby rendering moot nearly every aspect of petitioner's demands of TLCN with respect to future conduct. "As [TLCN] is already obligated to follow the law and there is nothing in the record to suggest that it will not do so, the extraordinary relief of an injunction is unnecessary and inappropriate" (*Matter of Willkie v. Delaware County Bd. of Elections*, 55 A.D.3d 1088, 1092, 865 N.Y.S.2d 739 [2008] [internal quotation marks and citations omitted]). Thus, we conclude that Supreme Court acted properly in ordering TLCN to adopt a conflict of interest policy and in otherwise dismissing the first cause of action.

[3] [4] Our review of the remaining causes of action must be guided by the principle that, inasmuch as Coburg is an independent corporation, TLCN may not operate Coburg in a manner inconsistent with Coburg's purpose, nor engage in related party transactions without complying with the relevant provisions of the Not–For–Profit Corporation

Law. In the second and third causes of action, petitioner alleges that respondents repeatedly violated the fiduciary duties owed to Coburg and, on that basis, seeks permanent removal of respondents from their positions as a member of Coburg, or as directors and officers of Coburg. Petitioners submitted evidence making a prima facie showing that TLCN violated N–PCL 508 and Coburg's certificate of incorporation by applying Coburg's surpluses for the benefit of other TLCN affiliates. As relevant here, Coburg's certificate of incorporation states that Coburg's purpose is "to meet special ***1284** housing needs of elderly persons and to serve the special physical needs which commonly attend advanced age ... by planning, developing, organizing, constructing, acquiring, altering, reconstructing, rehabilitating, owning, operating and maintaining safe, sanitary, independent living facilities." Coburg is entitled to make an incidental profit from operating such living facilities, provided that "[a]ll such incidental profits shall be applied to the maintenance, expansion or operation of the lawful activities of the corporation, and in no case shall be divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation" (N–PCL 508). Coburg's certificate of incorporation complies with N–PCL 508 by providing that "[n]o part of the net earnings of [Coburg] shall inure to the benefit of any member, trustee, director, or officer of [Coburg] or any private individual, except that reasonable compensation may be paid for services rendered to or for [Coburg]."

Petitioner also submitted transcripts of the deposition testimony of Tripodi and Fellegara, who both testified that the affiliates' boards of directors were only advisory and that Coburg's annual budgets were approved by TLCN's board of directors.[3] Sanford Ira Roth, who had served as a director of Coburg and TLCN, testified that as the proposed 2014 budget for Coburg ****158** was developed, it was revised twice to increase the budgeted surplus from $152,000 to $348,000 to $1 million. Tripodi explained that the large surplus was necessary to satisfy the terms of the loan agreement with a lender that had financed an expansion of the facilities at Coburg. He further testified that the large surplus was intended to be used to offset losses anticipated to be incurred by other affiliates, specifically stating that "there are several [affiliates] that lose money[, a]nd we use [Coburg's surplus] to offset those losses." Respondent Alec Davis, who had served as director of both Coburg and TLCN, similarly testified that Coburg had historically generated significant surpluses that were transferred to other TLCN affiliates.

Petitioner submitted evidence to support its further allegations that respondents had also diverted Coburg's incidental profits to TLCN by unilaterally imposing unreasonable management fees in related party transactions that did not comply with the Not–For–Profit Corporation Law (*see* N–PCL 715). Tripodi testified that the management fees paid by affiliates ***1285** were TLCN's sole source of revenue and that TLCN determined the amount of management fees to be paid by each affiliate by dividing the total amount of revenue that TLCN needed to operate among the affiliates based upon the amount of work that TLCN employees did for each affiliate. Tripodi acknowledged, however, that the affiliates were not provided with any accounting of the services that were provided in exchange for the management fees and that there were no agreements establishing those fees.[4] Rather, the management fees were included in the budget of each affiliate that was approved by TLCN's board of directors. Coburg's annual budgets for 2013, 2014 and 2015 included management fees of $614,914, $652,586 and $659,596, respectively, which Fellegara testified accounted for 35% of TLCN's management fees — the highest of any of the 11 affiliates. Tripodi also testified that affiliates that could not afford their management fee simply did not pay. Further, according to petitioner, TLCN also collected additional management fees from Coburg by reclassifying a $500,000 loan payment as a management fee. TLCN had made a loan of $3,500,000 to Coburg for an expansion project that was repayable in annual installments of $500,000. TLCN reclassified the loan payment that Coburg made in 2012 as a management fee to avoid violating the terms of a loan agreement with another lender, which prohibited repayment of loans between related parties. TLCN did not reduce the loan balance, and it is unclear from the record whether TLCN credited Coburg with payment of $500,000 toward the budgeted management fee.

Genuine issues of material fact exist as to whether respondents violated their duty to Coburg by improperly utilizing its surplus to benefit TLCN and its other affiliates and by engaging in related party transactions that were not in Coburg's best interest. Fellegara denied that Coburg's surpluses were transferred to other affiliates. She alleged that Coburg retained substantial cash surpluses and explained that a portion of the surpluses was used to repay the $3,500,000 loan. Respondents also proffered the affidavit of Philip Kanyuk, a certified public accountant, who concluded that there was "a sound basis for the management fees allocated to each [affiliate]" from 2012 through 2015.

**159 [5] The fourth cause of action seeks rescission of management fees paid to TLCN by Coburg after July 1, 2014 – the effective date of the amendment to N–PCL 715 – and an accounting of *1286 such amounts. The Attorney General is authorized to seek rescission of related party transactions made in violation of the Not–For–Profit Corporation Law (*see* N–PCL 715[f]). Further, the Attorney General may compel an accounting of corporate assets that were improperly transferred and may seek to set aside such transactions (*see* N–PCL 720[a], [b]). The fourth cause of action seeks relief that is dependent upon resolution of issues of fact related to whether respondents engaged in improper related party transactions or otherwise transferred Coburg's surplus to benefit TLCN and its other affiliates. Thus, the determination on the fourth cause of action must await resolution of issues of fact and, therefore, dismissal of this cause of action was improper.

[6] [7] [8] We further conclude that Supreme Court erred by applying the business judgment rule, "which provides that, where corporate officers or directors exercise unbiased judgment in determining that certain actions will promote the corporation's interests, courts will defer to those determinations if they were made in good faith" (*Matter of Kenneth Cole Prods., Inc., Shareholder Litig.*, 27 N.Y.3d 268, 274, 32 N.Y.S.3d 551, 52 N.E.3d 214 [2016]; *see M & M Country Store, Inc. v. Kelly*, 159 A.D.3d 1102, 1103, 71 N.Y.S.3d 707 [2018]). However, the business judgment rule has no place where corporate officers or directors take actions that exceed their authority under the relevant corporate bylaws (*see Fe Bland v. Two Trees Mgt. Co.*, 66 N.Y.2d 556, 565, 498 N.Y.S.2d 336, 489 N.E.2d 223 [1985]; *Brantley v. Municipal Credit Union*, 60 A.D.3d 551, 552, 879 N.Y.S.2d 395 [2009]), or where they make decisions affected by an inherent conflict of interest (*see Matter of Kenneth Cole Prods., Inc., Shareholder Litig.*, 27 N.Y.3d at 274–275, 32 N.Y.S.3d 551, 52 N.E.3d 214; *Auerbach v. Bennett*, 47 N.Y.2d 619, 631, 419 N.Y.S.2d 920, 393 N.E.2d 994 [1979]; *Wolf v. Rand*, 258 A.D.2d 401, 404, 685 N.Y.S.2d 708 [1999]). There are issues of fact in the present record that preclude application of the business judgment rule, specifically regarding whether respondents exceeded their authority by improperly utilizing Coburg's surplus to benefit TLCN and its other affiliates and by engaging in related party transactions that were not in Coburg's best interest.

McCarthy, J.P., Devine, Mulvey and Pritzker, JJ., concur.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as dismissed the second, third and fourth causes of action; matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

All Citations

167 A.D.3d 1281, 92 N.Y.S.3d 154, 2018 N.Y. Slip Op. 08727

Footnotes

1 The remaining individual respondents each served as a current or former director of TLCN.

2 Supreme Court granted judgment on the first cause of action to the extent of ordering TLCN to implement a conflict of interest policy in compliance with the Not–For–Profit Corporation Law (*see* N–PCL 715–a). Respondents do not challenge this determination and represent that the required policies have been adopted.

3 Their testimony was corroborated by a 2013 email from respondent John Melosh, who was then Chair of TLCN's Board of Directors, to respondent Alec Davis, who was then a director of Coburg.

4 Respondents did not provide any documentation in response to petitioner's subpoena regarding the time spent by TLCN's employees on the work of each affiliate.

End of Document

Exhibit 16

all purchase price. Whether or no the commissioner would have been better advised to promulgate an amended regulation 29 is beside the point. The tax is imposed, not by the directive or, for that matter, by the regulation, but by the state and local statutes. See Good Humor Corp. v. McGoldrick, 289 N.Y. 452, 46 N.E.2d 881. Since, however, the 1955 directive correctly expounds those statutes, the plaintiffs were no longer justified in relying on the explicit, but erroneous, 1952 directive or on the ambiguous regulation which has little or no greater weight. Cf. Burnet v. Chicago Portrait Co., 285 U.S. 1, 16, 20–21, 52 S.Ct. 275, 76 L.Ed. 587. We do not have before us an explicit regulation in conflict with an explicit directive.

The judgment appealed from declares in part that "the Federal and State excise taxes on liquor were elements of the ultimate cost of the product and thus should be included in the retail sales price upon which the tax is computed." This is correct as far as it goes, but, to avoid any possible implication, lurking in that recital, that the city has a right to proceed against liquor dealers for the tax which they would have collected between January 1, 1952 and September 30, 1955, had they treated the excise taxes as elements of ultimate cost to be included in the price upon which the tax is computed, it is essential that the declaration be clarified. We accomplish such clarification by modifying the judgment to include a further recital declaring that plaintiff and other dealers similarly situated were privileged, during the period prior to October 1, 1955, to compute the sales tax on the amount of the sale less the amount of the excise taxes and that it is only from and after October 1, 1955 that they became liable to collect such sales tax on the basis of the over-all purchase price, including the federal and state excise taxes.

The judgment of the Appellate Division should be modified in accordance with this opinion and, as so modified, affirmed.

CONWAY, C. J., and DESMOND, DYE, FROESSEL, VAN VOORHIS and BURKE, JJ., concur.

Judgment accordingly.

2 N.Y.2d 493

ROTHMAN & SCHNEIDER, Inc., Respondent,

v.

Sam BECKERMAN et al., Individually and as Copartners Doing Business under the Name of Beckerman & Lerner, Appellants.

Court of Appeals of New York.

March 8, 1957.

Civil action. Defendants appeal by permission of the Appellate Division of the Supreme Court in the First Judicial Department from an order of such court entered February 14, 1956, 1 A.D.2d 154, 148 N.Y.S. 2d 396, which affirmed an order of the Supreme Court at Special Term, Aron Steuer, J., 142 N.Y.S.2d 668, entered in New York County denying a motion by defendants to vacate and set aside the service of summons and complaint upon it. The following questions were certified: (1) Was Special Term correct in denying defendants' motion to set aside the service of the summons and complaint herein upon the defendants. (2) On the facts appearing in the record, should the summons and complaint herein and service thereof upon the moving defendants have been vacated and set aside upon the ground that the plaintiff corporation did not authorize the institution and prosecution of this action. (3) Was the secretary-treasurer of said corporation without authority to authorize the commencement of this action. The Court of Appeals, Fuld, J., held that the corporation's only active officer was authorized to institute a suit

against strangers to the corporation charged with alleged conversion of a portion of its assets.

Order of Appellate Division affirmed; first question answered in the affirmative; second and third in the negative.

1. Corporations ⇐432(2)

Where there has been no direct provision by the board of directors, the president has presumptive authority in the discharge of his duties to defend and prosecute suits in the name of the corporation.

2. Corporations ⇐432(2)

While in normal course implied authority vested in an actively functioning president will not devolve upon a secretary or treasurer of the corporation, such officer is deemed to have authority to act on behalf of the corporation where he has been the one actually managing its business.

3. Corporations ⇐419

Where a secretary-treasurer has alone been running the corporation, conducting its affairs without intervention from the board of directors or the president, he is vested with sufficient authority to institute an action against an outsider on the corporation's behalf.

4. Corporations ⇐419

Where incorporators acted as equals, neither questioning the authority of the other, and one incorporator gave up active participation and the other was to all intents its general manager and executive head, and corporation was a small, closely held corporation whose affairs were conducted informally and was about to be dissolved, the other incorporator, who was the corporation's only active officer, was authorized to institute suit against strangers to the corporation charged with converting a portion of its assets, without securing consent of majority of the board of directors.

Milton Kail, New York City, for appellants.

Herbert Cohen, New York City, for respondent.

FULD, Judge.

On this appeal, here by permission of the Appellate Division, we are asked to decide whether, in light of the particular facts and circumstances presented, the secretary-treasurer had authority to institute and prosecute this action on behalf of his corporation.

In 1938, Isidor Rothman and William Schneider organized the plaintiff corporation to manufacture and sell semiprecious stone rings. Each of them, along with his respective wife, owned 50% of the corporate stock, and all four were directors. Rothman was president and Schneider, secretary-treasurer. The corporate by-laws vested in the board of directors "control and general management of the affairs and business of the Company", the directors were to "act as a Board, regularly convened, by a majority" and each director was to have one vote. The president had the duties of calling directors' meetings and presiding at them, presenting reports of the company's condition, making and signing contracts, seeing that records were properly kept and handling personnel matters. The secretary was charged with the care of minutes, records and correspondence and with serving notice of meetings, and the treasurer was entrusted with the care of corporate funds and finances. As a practical matter, however, no directors' meetings were held, and Rothman and Schneider, according to the latter, "acted as equals and as partners * * * signed papers indiscriminately either Mr. Rothman as President and I as Secretary-Treasurer, verifying complaints or answers in litigation without any question ever having been raised."

On January 18, 1954, Rothman and Schneider entered into an agreement to

dissolve the corporation, it being explicitly provided that during the period of dissolution Schneider was to be in charge of the liquidation. The agreement also stipulated that he was to "have the right to announce to the trade, the retirement of" Rothman, "to advise the trade of the fact that [he, Schneider] will operate the business formerly conducted by the corporation", and to receive and handle all of the corporation's correspondence in the future. Neither party, the agreement further recited, was to "settle or compromise any claim or controversy in favor of or against the corporation unless by mutual consent of the party stockholders." Subsequent to this agreement, Schneider hired an attorney to defend two suits against the corporation, in one of which the corporation's president, Rothman, appeared as a witness. Despite the agreement to dissolve, however, defense counsel denied that the corporation was "in the process of dissolution", declaring that Rothman had given Schneider an option to purchase his share of the corporate stock, but that Schneider had not exercised the option within the time specified. At all events, the corporation has not yet been formally dissolved.

From 1947 to 1954, the corporation had employed Sam Beckerman, the son-in-law of Rothman and one of the defendants herein, as a salesman. In 1955, the corporation, at the instance of Schneider, brought the present suit against Beckerman and his partner Lerner; Rothman was not consulted. The complaint alleges that, while in plaintiff's employ, Beckerman had secretly formed a partnership with Lerner, converted a number of plaintiff's sample rings and then sold to plaintiff's customers rings which it manufactured from such samples at lower prices than plaintiff charged. Plaintiff sought judgment for some $30,000.

Asserting that the by-laws of the corporation required the consent of a majority of the board of directors to the institution of a lawsuit and that the Rothmans, holders of one half of the stock, opposed the present one, defendants sought dismissal of the action and moved to vacate service of the summons and complaint. An affidavit by Rothman in support of the application recited that he did not believe the action had any merit and that neither he nor his wife desired to have it prosecuted.

The court at Special Term denied the motion. The Appellate Division affirmed and certified three questions which, in effect, pose the issue of the secretary-treasurer's "authority to authorize the commencement of this action."

The defendants place their primary reliance on Sterling Industries v. Ball Bearing Pen Corp., 298 N.Y. 483, 84 N.E.2d 790, 10 A.L.R.2d 694, where we held that the president of plaintiff corporation lacked authority to institute a suit upon the company's behalf. However, as the opinion indicates, the decision turned largely on the facts of the case. In the first place, the suit was against so-called "insiders," that is, another corporation consisting of two individuals who owned half of plaintiff corporation's stock and were two of its four directors and, in the second place, plaintiff's board of directors actually refused, when requested to act, to give the president permission to institute the action. In view of such facts, wrote the court, "there is no question here of any presumptive or prima facie authority in the president of a corporation qua president to institute litigation and engage counsel therefor. [Cases cited.] Nor is there question of apparent authority, since we consider here no rights of outsiders or third parties, but only those of organizers of plaintiff corporation and representatives of Pen Co. Any actual or implied authority which Middleman may have had as president to commence this action was terminated when a majority of the board of directors at the special meeting refused to sanction it", 298 N.Y. at page 490, 84 N.E.2d at page 792.

[1] As we have already suggested, our decision in Sterling does not mean that a

corporation may not institute suit without a formal vote of authorization by the board of directors. Where there has been no direct prohibition by the board, then, it has been held, the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation. See, e. g., Matter of Bernheimer, 266 App.Div. 868, 43 N.Y.S.2d 277, affirming 4 Misc.2d 503, 43 N.Y.S.2d 300; Warwick Sportswear Co. v. Simons, 4 Misc. 2d 482, 13 N.Y.S.2d 321; Regal Cleaners & Dyers v. Merlis, 2 Cir., 274 F. 915, 917; Lydia E. Pinkham Medicine Co. v. Gove, 298 Mass. 53, 65, 9 N.E.2d 573; Elblum Holding Corp. v. Mintz, 120 N.J.L. 604, 608, 1 A.2d 204; see, also, 2 Fletcher's Cyclopedia Corporations [1954 Rev.Vol.], § 618.1. And, when directors deadlock over corporate litigation and the president hires an attorney to sue or defend for the corporation, he may proceed and recover compensation for his work. See, e. g., Matter of Bernheimer, supra, 266 App.Div. 868, 43 N.Y.S.2d 277, affirming 4 Misc.2d 503, 43 N.Y.S.2d 300; see, also, Potter v. New York Infant Asylum, 118 N.Y. 684, 23 N.E. 1147, affirming 44 Hun 367.

[2, 3] While in the normal course the implied authority vested in an actively functioning president will not devolve upon a secretary or treasurer, such officer will be deemed to have authority to act and speak on behalf of the corporation where he has been the one actually managing its business. See Barkin Const. Co. v. Goodman, 221 N.Y. 156, 161, 116 N.E. 770, 771; Perry v. Council Bluffs City Water-Works Co., 143 N.Y. 637, 37 N.E. 826, affirming 67 Hun 456, 464–466, 22 N.Y.S. 151, 153; Hastings v. Brooklyn Life Ins. Co., 138 N.Y. 473, 479, 34 N.E. 289, 291; Phillips v. Campbell, 43 N.Y. 271, 272; Schirone v. Hochheiser & Weisberg, 237 App.Div. 723, 262 N.Y.S. 763, affirmed 263 N.Y. 624, 189 N.E. 728. And, by parity of reasoning, where a secretary-treasurer has alone been running the company, alone conducting its affairs generally without intervention or direction from board of directors or president, there is no reason, in law or practice, why he should not be able to institute an action against an outsider, on the corporation's behalf, to preserve its existence or otherwise protect its interests. Certainly, he is vested with sufficient authority from the corporation to "speak for it", Barkin Const. Co. v. Goodman, 221 N.Y. 156, 161, 116 N.E. 770, 772, supra, to succeed against the third party's protestation that he lacks the power to bring the suit.

In the case before us, Schneider did not have express authority to institute litigation in the corporation's name; the by-laws gave him no such power and the board of directors, not requested to pass upon the matter, took no action. However, as the discussion already indicates, the evidence is clear and strong that he did have implied authority to proceed against these defendants. He and Rothman had acted "as equals and as partners", neither questioning the authority of the other, and both signing papers and verifying pleadings in litigation "indiscriminately". Whether or not that course of conduct may in and of itself denote authority in one to act without the consent of the other, we need not say, for in this case the agreement to dissolve the corporation plus the subsequent dealings of the parties convincingly demonstrate that Rothman gave up active participation in the business of the corporation in January of 1954 and that Schneider was for all intents and purposes its general manager and executive head, undoubtedly with the full knowledge and acquiescence of the other stockholders and directors. It is true that he was not permitted to *settle* claims in favor of or against the corporation but, without any demur or objection from Rothman, he had hired counsel to defend two suits brought against it. While counsel for defendants now maintain that Rothman did not know, and would not have approved, of Schneider's defense of one of these suits, this simply points up the continued course of conduct of these men—Schneider's extensive powers vis-à-vis the management of the corporation, with all that that implies,

and Rothman's almost complete withdrawal from the company and its affairs.

[4] It is to be borne in mind that we are dealing with a small closely held corporation, whose affairs were conducted without formality of any kind and that, following the agreement to dissolve the corporation, the president went into "retirement," leaving the entire management and operation of the company to its secretary-treasurer. His was the headship, the responsibility for the conduct of the corporate business being left with him. Having in mind the realities of the situation, the courts below were fully warranted in concluding that the company's only active officer was authorized to institute and prosecute such a suit as this, and certainly the defendants before us, complete strangers to the corporation and actually charged with converting a portion of its assets, should not be permitted to question his authority and thereby frustrate the action.

The order of the Appellate Division should be affirmed, with costs. The first question certified should be answered in the affirmative, the second and third in the negative.

CONWAY, C. J., and DESMOND, DYE, FROESSEL, VAN VOORHIS and BURKE, JJ., concur.

Order affirmed, etc.

Exhibit 17

250 A.D.2d 596, 672 N.Y.S.2d
386, 1998 N.Y. Slip Op. 04541

TJI Realty, Inc., Appellant,
v.
Irving Harris, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
97-08618
(May 4, 1998)

CITE TITLE AS: TJI Realty v Harris

In an action, *inter alia,* for a judgment declaring that a corporate resolution enacted March 26, 1997, is valid, the plaintiff appeals from a judgment of the Supreme Court, Westchester County (Coppola, J.), entered August 12, 1997, which, *inter alia,* vacated a stay of a proceeding pending in the Justice Court of the Town of Rye entitled *TJI Realty v Harris Rest. Supply* and dismissed the action.

HEADNOTE

CORPORATIONS
OFFICERS AND DIRECTORS
Validity of Resolution

() In action for judgment declaring that corporate resolution is valid, judgment of Supreme Court which vacated stay of proceeding pending in Justice Court and dismissed action reversed --- Appeal concerns validity of corporate resolution to withdraw summary proceeding before Justice Court --- Absent provision in by-laws or action by board of directors prohibiting president from instituting suit in name of and in behalf of corporation, he must be deemed, in discharge of his duties, to have presumptive authority to so act; thus, proceeding in Justice Court was permissibly commenced by defendant in his capacity as plaintiff's president; however, given that business of corporation is to be conducted by board of directors, proceeding may not be maintained by defendant in that capacity if it is contrary to duly-authorized directives of board; neither board of directors nor any individual member or members thereof may exercise such authority in violation of fiduciary duties owed corporation; thus, resolution at issue, if properly adopted and otherwise valid, would warrant dismissal of Justice Court proceeding; here, allegations proffered by defendant involved both procedural aspects of adoption of resolution at issue, and its validity; however, Supreme Court, in essence, determined only that, procedurally, resolution at issue was properly adopted, and referred defendant's substantive challenges to Justice Court proceeding for determination; this was error --- Procedurally, other directors adequately complied with relevant corporate by-laws in adopting resolution at issue; however, defendant's other challenges to validity of resolution fall beyond subject matter jurisdiction of Justice Court; those issues should be resolved by Supreme Court as part of its determination as to validity of resolution at issue; in addition, such issues may be properly raised by defendant in his capacity as director of plaintiff without resort to shareholder's derivative action; accordingly, judgment reversed and matter remitted for further proceedings.

Ordered that the judgment is reversed, on the law, with costs, the stay is reinstated, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings in accordance herewith.

This appeal concerns the validity of a corporate resolution to withdraw a summary proceeding before a Justice Court. TJI Realty, Inc. (hereinafter TJI), the plaintiff in this action, is a closely-held New York corporation. TJI's directors are Anthony Lanza, Joseph Ciardullo, and the defendant Irving Harris. At all relevant times Irving Harris was also the president of TJI. TJI's sole asset is a commercial property in Port Chester, New York. In November 1978 TJI leased the property to Harris Restaurant Supply, Inc. (hereinafter Harris Supply), for a term of 20 years. Lanza is the sole shareholder of Harris Supply. Over the past few years the relationship among the three directors deteriorated. Pursuant to unrelated litigation commenced by Irving Harris concerning Ciardullo's transfer of his shares to Lanza, Irving Harris allegedly discovered that a rider to the lease between TJI and Harris Supply had been executed which provided for, among other things, a significant reduction in rent. Irving Harris asserted that this new arrangement was undertaken without his knowledge and in the absence of any corporate authorization or justification. He further alleged that the new terms were far below terms that reflect prevailing rates and that the rider, if valid and enforceable, would drive TJI into bankruptcy because the rental income would be insufficient to cover operating expenses. Moreover, Irving Harris asserted that Harris Supply was in violation of various terms of the lease. Accordingly, on or about March 11, 1997, Irving Harris, in

his capacity as president of TJI, signed a Demand for Rent and Notice of Default, both of which were served on Harris Supply. ***597**

Harris Supply did not comply with the demands. By letter dated March 18, 1997, Lanza and Ciardullo demanded that Irving Harris call a special meeting of the TJI board of directors for March 26, 1997. Irving Harris refused.

On or about March 25, 1997, TJI, by Irving Harris in his capacity as president, commenced a proceeding against Harris Supply in the Justice Court of the Village of Rye pursuant to RPAPL article 7. TJI sought, *inter alia,* the eviction of Harris Supply and various additional and back rent. On March 26, 1997, Lanza and Ciardullo, in accordance with their written demand upon Irving Harris, convened for a special meeting of the TJI board of directors. Lanza and Ciardullo, proceeding in Irving Harris' absence, adopted several corporate resolutions, including one providing for the discontinuance of the Justice Court proceeding. However, the Justice Court, once apprised of the internal strife in TJI, refused all efforts to effectuate the resolution and directed the parties to seek relief before the Supreme Court. Accordingly, on or about May 6, 1997, Lanza commenced this action on behalf of TJI against Irving Harris, seeking, among other things, a declaration that the corporate resolution providing for the discontinuance of the Justice Court action was validly adopted and binding. In defense, Irving Harris argued that, procedurally, the resolution had not been validly adopted and that, substantively, the resolution was void due to, among other things, self-dealing and breach of fiduciary duty by Lanza concerning both the execution of the rider to the lease and the adoption of the corporate resolution at issue (*see, Rapoport v Schneider,* 29 NY2d 396; *Aronoff v Albanese,* 85 AD2d 3; *Conant v Schnall,* 33 AD2d 326).

In the judgment appealed from, the Supreme Court, *inter alia,* dismissed the action. However, the Supreme Court characterized Irving Harris' claims as being in the nature of shareholder's derivative claims immune from board action, and it lifted a stay of the Justice Court proceeding and directed the parties to litigate all remaining matters in that forum. We now reverse.

Pursuant to TJI's by-laws and as a general rule, the business of the corporation is to be managed by its board of directors (*see,* Business Corporation Law § 701; *Matter of Paloma Frocks [Shamekin Sportswear Corp.],* 3 NY2d 572; *Matter of Vogel [Lewis],* 25 AD2d 212, *affd* 19 NY2d 589). However, as here, "[a]bsent a provision in the by-laws or action by the board of directors prohibiting the president from ... instituting suit in the name of and in behalf of the corporation, he must be deemed, in the discharge of his duties, to have presumptive ***598** authority to so act" (*West View Hills v Lizau Realty Corp.,* 6 NY2d 344, 348; *see also, Happy Banana v Tishman Constr. Corp.,* 179 AD2d 562; *Polchinski Co. v Cemetery Floral Co.,* 79 AD2d 648). Thus, the proceeding in the Justice Court was permissibly commenced by Irving Harris in his capacity as TJI's president. However, given that the business of the corporation is to be conducted by the board of directors, the proceeding may not be maintained by Irving Harris in that capacity if it is contrary to the duly-authorized directives of the board (*see, Leslie v Lorillard,* 110 NY 519; *Hertz v Quinn & Kerns,* 21 Misc 2d 227). Of course, neither the board of directors nor any individual member or members thereof may exercise such authority in violation of, *inter alia,* fiduciary duties owed the corporation (*see,* Business Corporation Law §§ 717, 720; *Rapoport v Schneider, supra,* at 396; *Limmer v Medallion Group,* 75 AD2d 299). Thus, the resolution at issue, if properly adopted and otherwise valid, would warrant dismissal of the Justice Court proceeding. Here, the allegations proffered by Irving Harris involved both the procedural aspects of the adoption of the resolution at issue, and its validity. However, the Supreme Court, in essence, determined only that, procedurally, the resolution at issue was properly adopted, and referred Irving Harris' substantive challenges to the Justice Court proceeding for determination. This was error.

Procedurally, Lanza and Ciardullo adequately complied with the relevant corporate by-laws in adopting the resolution at issue. However, Irving Harris' other challenges to the validity of the resolution fall beyond the subject matter jurisdiction of the Justice Court (*see,* UJCA 201, 208; *Ali Baba Creations v Congress Textile Printers,* 41 AD2d 924; *Krauss v Dinerstein,* 62 Misc 2d 682; *cf., Green v Glenbriar Co.,* 131 AD2d 363). Those issues should be resolved by the Supreme Court as part of its determination as to the validity of the resolution at issue. In addition, such issues may be properly raised by Irving Harris in his capacity as a director of TJI without resort to a shareholder's derivative action (*see,* Business Corporation Law § 720 [b]; *Tenney v Rosenthal,* 6 NY2d 204; *Conant v Schnall,* 33 AD2d 326). Accordingly, the judgment is reversed and the matter is remitted for further proceedings in

accordance herewith, without prejudice to any party to seek, if warranted, an appropriate amendment of the pleadings. Pending determination of this action, the Justice Court proceeding is stayed without prejudice to the Supreme Court vacating the stay in the event that the eviction proceeding is transferred to the Supreme Court and joined with the pending action.

Rosenblatt, J. P., Ritter, Krausman and Goldstein, JJ., concur. *599

End of Document

Exhibit 18

KeyCite Yellow Flag - Negative Treatment
Distinguished by Sanitary Dist. No. 4-Town of Brookfield v. City of Brookfield, Wis.App., March 31, 2009

16 Wis.2d 206
Supreme Court of Wisconsin.

VILLAGE OF BROWN DEER, a municipal corporation, Appellant,
v.
CITY OF MILWAUKEE, a municipal corporation, et al., Respondents.

April 3, 1962.
|
Rehearing Denied June 5, 1962.

Synopsis
Declaratory judgment action involving validity of ordinances purporting to annex territories to village and city. The Circuit Court, Milwaukee County, William I. O'Neill, J., rendered judgment, and appeals were taken. The Supreme Court, Gordon, J., held, in part, that director was not authorized to sign annexation petition on behalf of corporation without obtaining either formal or informal authorization of board of directors, even though he owned 51 percent of stock of corporation, he may have been accustomed to resolving problems of corporation as sole owner, board of directors met infrequently or corporation subsequently ratified his act.

Affirmed in part and reversed in part.

Currie and Hallows, JJ., dissented in part.

West Headnotes (14)

[1] **Corporations and Business Organizations**
Persons entitled to question authority

Principal and Agent
Repudiation by Principal

Generally, if corporation does not raise objection that officer lacked authority to do act on behalf of corporation, such objection may not be raised by third person.

5 Cases that cite this headnote

[2] **Corporations and Business Organizations**
Persons interested in or damaged by act complained of

When corporation purports to perform political act, as opposed to any business act, other interested parties may be heard to challenge validity thereof.

Cases that cite this headnote

[3] **Municipal Corporations**
Petition

Interested municipality may raise question of lack of authority of person purporting to sign annexation petition on behalf of corporation. W.S.A. 62.07(1)(a).

Cases that cite this headnote

[4] **Corporations and Business Organizations**
Creature of law, fiction, or artificial being

Corporations and Business Organizations
Constitutional and statutory provisions

Corporations owed their existence to statutes and those who would enjoy benefits that attend corporate form of operation are obliged to conduct their affairs in accordance with laws which authorized corporations. W.S.A. 180.30, 180.91.

4 Cases that cite this headnote

[5] **Corporations and Business Organizations**
Mode of action in general

Corporation cannot act informally, without meeting other, than by obtaining consent in writing of all directors. W.S.A. 180.91.

Cases that cite this headnote

[6] **Corporations and Business Organizations**
Mode of action in general

Presence of apparent authority and estoppel which might prevent application of rule that corporation can act without meeting of directors only by obtaining consent in writing of all

directors, in matters which flow in normal course of business, cannot apply where directors' action relates to political determination and is outside ordinary course of normal business operations. W.S.A. 180.91.

Cases that cite this headnote

[7] **Corporations and Business Organizations**
Mode of action in general

In deciding whether to sign annexation petition, corporation may not validly act in informal manner unless it complies with statutes. W.S.A. 62.07(1)(a), 180.91.

1 Cases that cite this headnote

[8] **Corporations and Business Organizations**
Directors, officers, or agents acting as individuals or shareholders

Corporations and Business Organizations
Persons holding entire or controlling stock

Principal and Agent
Implied Agency

Director was not authorized to sign annexation petition on behalf of corporation without obtaining either formal or informal authorization from board of directors, even though he owned 51 percent of corporate stock, he may have been accustomed to resolving problems of corporation as sole owner, board of directors met infrequently, or corporation subsequently ratified his act. W.S.A. 62.07(1)(a), 180.91.

4 Cases that cite this headnote

[9] **Municipal Corporations**
Petition

Annexation petition must be valid as of time it is submitted to city council. W.S.A. 62.07(1)(a).

2 Cases that cite this headnote

[10] **Municipal Corporations**
Petition

Nonregistered persons otherwise qualified as electors were qualified to sign petition for annexation. W.S.A. 6.01, 62.07(1)(a).

Cases that cite this headnote

[11] **Appeal and Error**
Effect of divided court

Municipal Corporations
Petition

Members of Supreme Court were equally divided as to whether those who signed annexation petition as "owners", might also be counted as "electors" even though they signed in former capacity only. W.S.A. 6.01, 62.07(1)(a).

1 Cases that cite this headnote

[12] **Appeal and Error**
Effect of divided court

Equally divided court results in affirmance of court below.

1 Cases that cite this headnote

[13] **Clubs**
Officers and committees

Municipal Corporations
Petition

Signature on annexation petition of golf club president followed by name of club in president's handwriting reflected corporate act and, in absence of proof that corporation's signature was unauthorized, signature was sufficient. W.S.A. 62.07(1)(a).

2 Cases that cite this headnote

[14] **Municipal Corporations**
Ordinances annexing or detaching territory

Ordinance purporting to annex territory to city was invalid where annexation ordinance was adopted one year and 26 days after proceedings were initiated, and territory consisted of only

1.025 square miles and contained only 70 electors. W.S.A. 62.07(1)(a).

Cases that cite this headnote

**495 *208 This is an action for a declaratory judgment commenced on March 15, 1956, by the village of Brown Deer against the city of Milwaukee and the town of Granville. Prior to the events which precipitated this lawsuit, Granville was an unincorporated area of 22 ½ square miles located in Milwaukee county. In 1956, Brown Deer adopted five ordinances purporting to annex five different territories in Granville. Milwaukee, in 1956, adopted an ordinance purporting to annex territory in Granville, a part of which was included in one of the Brown Deer annexations. During that same year Milwaukee and Granville adopted consolidation ordinances which were subsequently approved at a referendum. Thereafter, Milwaukee asserted jurisdiction over all of Granville. Originally, Brown Deer sought a declaratory judgment which requested a determination that its five annexation ordinances were valid, that Milwaukee's annexation ordinance was invalid, and that Milwaukee's and Granville's consolidation ordinances were invalid.

In the first of the prior appeals this court determined that Brown Deer's annexations of territories in Granville took *209 precedence over Milwaukee's consolidation with Granville. Thus, if Brown Deer's annexation ordinances were valid, then the territories involved would become part of Brown Deer. Brown Deer, Village of, v. City of Milwaukee (1956), 274 Wis. 50, 79 N.W.2d 340.

Pursuant to the mandate of this court in the second appeal, the trial court entered summary judgment that the consolidation ordinances of Milwaukee and Granville were valid. Brown Deer, Village of, v. City of Milwaukee (1957), 2 Wis.2d 441, 86 N.W.2d 487.

Subsequent to the decision of this court on the second appeal, the matter finally proceeded to trial. Brown Deer sought to establish the validity of its five annexation ordinances and the invalidity of an annexation ordinance adopted by the city of Milwaukee. The ordinances in issue are:

1. Brown Deer

No. 31—Corrigan Territory—10 ½ square miles

No. 35—Brown Deer Park Territory—¾ square mile

No. 53—Laun Territory—¼ square mile

No. 32—Tripoli Territory—¼ square mile

No. 34—Johnson Territory—4 ½ square miles

2. Milwaukee

No. 631—Schroedel-West Territory—1 square mile

The trial court determined that Brown Deer's ordinances nos. 32 and 34 were valid, but that nos. 31, 35 and 53 were invalid; and that Milwaukee's ordinance no. 631 was invalid. A judgment was entered on September 25, 1959. Brown Deer is appealing from that portion of the judgment which determines that three of its annexation ordinances are invalid, and Milwaukee has moved to review certain matters involved in such appeal. Milwaukee is cross-appealing from that portion of the judgment which upheld the *210 validity of the two Brown Deer annexation ordinances, and which held invalid the Milwaukee annexation ordinance. Brown Deer has moved to review certain questions involved in the appeal taken by the city of Milwaukee.

Further facts will be stated in the opinion.

Attorneys and Law Firms

**496 Harold H. Fuhrman, Village Atty., John P. Roemer, Ralph M. Hoyt, Sp. Counsel, Milwaukee, for appellant.

John J. Fleming, City Atty., Harry G. Slater, Deputy City Atty., Richard F. Maruszewski, John F. Cook, Asst. City Attys., Milwaukee, Marvin E. Klitsner, Milwaukee, of counsel, for respondents.

Opinion

GORDON, Justice.

All of the six annexations involved here were prosecuted under sec. 62.07(1)(a), Stats.1955. This statute provided in part that:

'(1) Annexation procedure. Territory adjacent to any city may be annexed to such city in the manner following:

'(a) A petition therefor shall be presented to the council 1. signed by a majority of the electors in such adjacent territory

and by the owners of one-half of the real estate within the limits of the territory proposed to be annexed, or 2. if no electors reside in the said adjacent territory signed by the owners of one-half of taxable property therein according to the last tax roll, or 3. by a majority of the electors and the owners of one-half of the real estate in assessed value; provided, that no petition for annexation shall be valid unless at least 10 days and not more than 20 days before any such petition is caused to be circulated, a notice shall be posted in at least 8 public places in the municipality.'

Most of the issues concern whether the petition for annexation was signed 'by a majority of the electors and the owners of one-half of the real estate in assessed value.'

***211** Each annexation ordinance will be discussed separately.

1. *The Corrigan Annexation*

The total assessed value of real estate in the Corrigan territory was $3,863,796, so that signatures of the owners of at least $1,931,898 of assessed value would be required for a valid petition. However, the trial court found that the petition contained the signatures of the owners of only $1,922,775 of assessed value, and thus there was a deficiency of $9,123. For this reason the annexation ordinance was held invalid by the trial court.

There are four principal issues raised upon the challenge to this annexation:

1. Whether the signature on the petition made on behalf of the Evert Container Corporation was properly authorized;

2. Whether the interest of Mary Cudahy Keogh, the owner of a remainder interest in real estate devised to her by her father, John Cudahy, with an assessed value of $30,297.75 was represented on the annexation petition by a sufficient signature;

3. Whether the signature of Mr. and Mrs. Mulholland on the petition was sufficient to commit a tract with an assessed value of $18,800 in favor of the annexation; and

4. Whether real estate owned by two railroads and an electric power company within the area in question should have been added to the total assessed value of real estate in the Corrigan territory.

We conclude that the assessed valuation of the Evert Container Corporation, in the sum of $231,375, was improperly included in the computation of the total assessed value for which owners had signed on the annexation petition. No determination of any of the other issues, or any combination of such issues, in favor of Brown Deer, could alter the result of invalidation which attends our conclusion that the assessed value of the real estate of the Evert Container Corporation ***212** was improperly included on the annexation petition. Accordingly, we do not reach the other issues stated above.

The Evert Container Corporation has an eleven member board of directors. Charles Evert is president of the corporation, the ****497** majority stockholder and a member of the board of directors. Although he discussed the question of his signing the petition with a majority of the members of the board of directors before he actually signed, the evidence is clear that Mr. Evert purported to sign on behalf of the corporation without obtaining either formal authorization from the board of directors or informal authorization as permitted under sec. 180.91, Stats.

[1] Brown Deer contends that Milwaukee has no standing to challenge the authority of the president, Mr. Evert, to sign the petition on behalf of the corporation. As a general rule, if a corporation does not raise the objection that an officer lacked authority to do an act on behalf of the corporation, such objection may not be raised by a third person. 2 Fletcher, Cyclopedia Corporations, p. 523, sec. 490.

[2] However, we believe that when a corporation purports to perform a political act, as opposed to a business act, other interested parties may be heard to challenge the validity thereof. Milwaukee is a vitally interested third party. Milwaukee has adopted a valid ordinance consolidating Granville; Brown Deer has adopted an ordinance purporting to annex territory in Granville. Such ordinance takes precedence over Milwaukee's consolidation.

[3] **[4]** We conclude that an interested municipality may raise the question of the lack of authority of a person purporting to sign an annexation petition on behalf of a corporation. Certainly Milwaukee could challenge the legal title of a person who signed an annexation petition as an owner of real estate. We see no difference in principle.

***213** Sec. 180.30, Stats.1955, provides:

> 'The business and affairs of a corporation shall be managed by a board of directors. * * *'

Sec. 180.91, Stats.1955, provides as follows:

> 'Any action required by the articles of incorporation or by-laws of any corporation or any provision of law to be taken at a meeting or any other action which may be taken at a meeting, may be taken without a meeting if a consent in writing setting forth the action so taken shall be signed by all of the shareholders, subscribers, directors or members of a committee thereof entitled to vote with respect to the subject matter thereof. Such consent shall have the same force and effect as a unanimous vote, and may be stated as such in any articles or document filed with the secretary of state under this chapter.'

Sec. 180.91 was adopted in order to permit informal action by the board of directors. Corporations owe their existence to the statutes. Those who would enjoy the benefits that attend the corporate form of operation are obliged to conduct their affairs in accordance with the laws which authorized them. In 2 Fletcher, Cyclopedia Corporations, sec. 392, p. 227, it is stated:

> 'By the overwhelming weight of authority, when the power to do particular acts, or general authority to manage the affairs of the corporation, is vested in the directors or trustees, it is vested in them, not individually, but as a board, and, as a general rule, they can act so as to bind the corporation only when they act as a board and at a legal meeting.'

[5] The legislature having specified the means whereby corporations could function informally, it becomes incumbent upon the courts to enforce such legislative pronouncements. The legislature has said that the corporation could act informally, ***214** without a meeting, by obtaining the consent in writing of all of the Directors. In our opinion, this pronouncement has preempted the field and prohibits corporations from acting informally without complying with sec. 180.91, Stats.

****498** One of those who helped draft the Wisconsin Business Corporation Law, Dean George Young, has discussed this section in 1952 Wis.L.Rev. 5, and he says, at p. 19:

> 'In addition, informal action may be taken without any meeting under section 180.91 by either directors or shareholders upon the unanimous written consent of all entitled to vote upon the subject of the action taken. Permitting corporate action based solely upon written assent, of course, sacrifices whatever wisdom there may be in requiring that decisions be made only after face to face discussion, but the advantage of flexibility probably outweighs any disadvantage. In any event, we all know that in fact many corporate meetings are held without the requisite formalities and the waivers and minutes are later prepared *ex post facto* to show compliance with the law. Such subterfuges should no longer be excusable under the new provision.'

[6] [7] The presence of apparent authority and estoppel which might prevent the application of this rule in matters which flow in the normal course of business cannot apply where the action of the directors relates to a political determination and is outside of the ordinary course of normal business operations. In DeBauche v. City of Green Bay (1938), 227 Wis. 148, 153, 277 N.W. 147, the court stated that when an elector signed an annexation petition he was 'discharging his duty in shaping and influencing this particular after of government.' The signing of a petition which would change the local government under which the corporation functions is more closely analogous to such

unusual acts of the corporation as the disposition of its assets, as opposed to acts in the ordinary course of business. In deciding whether to sign *215 an annexation petition, we believe it is clear that the corporation may not validly act in an informal manner unless it be in compliance with the statutes. 2 Fletcher, Cyclopedia Corporations, p. 664, sec. 592.

There can be no doubt as to the rule in Wisconsin in view of the enactment of sec. 180.91 by the Wisconsin legislature. Fletcher also makes the following statement in his treatise at sec. 396 with respect to the effect of a statute permitting informal corporate action:

> 'Of course, a statute may authorize particular acts to be done by the directors acting otherwise than as a board and at a formal meeting. But where it is claimed that the statutes of the state permit the corporation to dispense with this eminently wise and just rule, the construction will be strictly against any such contention.'

[8] The fact (1) that Mr. Evert owned 51 per cent of the stock of the corporation, or (2) that he may have been accustomed to resolving the problems of the corporation as a sole owner, or (3) that the board of directors met infrequently, or (4) that the corporation subsequently ratified his act do not derogate from the clear mandate of the statute.

[9] The annexation petition must be valid as of the time it is submitted to the city council. Blooming Grove, Town of, v. City of Madison (1960), 9 Wis.2d 443, 101 N.W.2d 809. Accordingly, ratification is of no avail.

2. *The Brown Deer Park Annexation*

The trial court held this ordinance to be invalid because the description of the territory was incorrect. The misdescription involved a strip of land which belonged to another incorporated municipality, the village of River Hills. In view of our conclusion regarding the legal insufficiency of the corporate signature of Manufacturers Products, Inc., we do not reach the question of the inaccurate description.

*216 The total assessed value of the real estate within the Brown Deer Park territory was **499 $118,275. Including the $21,500 of assessed value owned by Manufacturers Products, Inc., the trial court found that $69,308 or over one-half of the total assessed value was represented on the petition. If the signature of this corporation is excluded, the petition would be insufficient and the ordinance invalid.

The record establishes that Mr. W. A. Meyer, the president of the corporation and owner of 75 per cent of its stock, signed the petition without either formal authorization by the board of directors or informal authorization permitted under sec. 180.91, Stats. For the reasons recited in connection with the Corrigan annexation, we hold this signature to be insufficient; the annexation ordinance based thereon is invalid.

3. *The Laun Annexation*

The trial court held that this ordinance was invalid because an insufficient number of electors signed the petition. Two separate problems are raised in connection with this annexation petition:

a) Whether the total number of electors should include eleven persons who qualified as electors but who had not registered to vote.

b) Whether six persons who signed the petition under the heading of 'owner' but not under the heading of 'elector' could also be counted in the latter capacity.

The trial judge held that the eleven non-registered electors qualified as electors but that none of the six electors who signed only as an 'owner' could also be counted as an 'elector'.

[10] Sec. 62.07(1)(a), Stats., requires the signatures of 'a majority of the electors in such adjacent territory.' Sec. 6.01, Stats., sets forth the qualifications for electors; registration is not one of the qualifications. The relevant statutes are *217 unambiguous and simply do not require an elector to be registered; we are unable to restrict the word 'elector' by adding the requirement that he be registered to vote. We are unanimous in our conclusion that the trial court properly refrained from excluding the non-registered persons who otherwise qualified as electors.

[11] The members of this court are equally divided in regard to the question whether those who signed as 'owners' may also be counted as 'electors' even though they signed in the former capacity only. Three of the justices (Mr. Justice CURRIE,

Mr. Justice FAIRCHILD and Mr. Justice HALLOWS) believe that a single signature on the petition is adequate to commit the signer to support the petition in both capacities, if in fact the signer is both an owner and an elector. Three other justices (Mr. Chief Justice BROADFOOT, Mr. Justice BROWN and the writer) believe that each petitioner had a right to choose the form of classification with which he desired to be identified in the petition, and that when a petitioner signs only as an 'owner' the court cannot infer the intent of such petitioner also to sign as an 'elector'.

[12] Under the rule that an equally divided court results in affirmance of the court below, we reach the result that the Laun territory ordinance is invalid. Hagenah v. Milwaukee Electric R. & Light Co. (1908), 136 Wis. 300, 116 N.W. 843;

Jacobs v. Queens Ins. Co. (1905), 123 Wis. 608, 612, 101 N.W. 1090.

4. *The Tripoli Annexation*

[13] The total assessed value of real estate in this territory was $169,800, of which $149,200 was owned by the Tripoli Golf Club. The trial court found that the signature on the petition entered on behalf of the golf club was sufficient. Because more than one-half of the necessary ownership was represented on the petition, the ordinance was held valid. We agree.

***218** The golf club's president signed the petition as follows: 'George C. Kroening Pres. ****500** Tripoli Golf Club 2/6/56.' In our opinion, the trial judge correctly ruled that this signature reflected a corporate act. It strains reason to hold that this is only the signature of an individual, Mr. Kroening, and that the words 'Pres. Tripoli Golf Club' serve only to identify him.

There was no proof presented to show that the corporation's signature was unauthorized and, in the absence of such proof, the signature stands unimpeached.

5. *The Johnson Annexation*

The assessed value of the real estate in the Johnson territory was $2,960,011. The trial court found that the owners of assessed value in the sum of $1,598,535 had signed the petition for annexation. This was over one-half of the total and included $210,400 of assessed value of the Good Hope Investment Co. The ordinance was held valid.

The petition was signed on behalf of the Good Hope Investment Co. by its president, Ben Lewenauer. The record shows that he signed without either formal authorization by the board of directors or informal authorization by the directors permitted under sec. 180.91, Stats. For the reasons presented in our consideration of the Corrigan annexation, the corporate signature was ineffective. This reduces the assessed value represented upon the petition to under one-half. The ordinance based thereon is invalid.

6. *The Schroedel-West Annexation*

The city of Milwaukee adopted an ordinance purporting to annex a portion of Granville referred to as the Schroedel-West territory. The village of Brown Deer disputes the validity of this ordinance and raises three objections:

a) The city has failed to prosecute the annexation within a reasonable time.

***219** b) The posting of the notices of intention to circulate the petition of annexation was not in eight public places as required by the statute.

c) The annexation was not prosecuted in good faith because, during the pendency of this annexation, the city initiated and completed another annexation which included a portion of the same territory involved in the Schroedel-West annexation.

The trial judge held this ordinance invalid on the grounds that the notices were not posted in compliance with sec. 62.07(1)(a), Stats. We have concluded that the ordinance is invalid because of Milwaukee's failure to prosecute it within a reasonable time and, therefore, we do not reach the other questions referred to above.

[14] The annexation proceedings were initiated by the posting of notices on January 25, 1955. One year and 26 days later, on February 21, 1956, the annexation ordinance was adopted. We note that the territory involved consisted of only 1.025 square miles and contained only 70 electors.

In the case of In re Village of Brown Deer (1954), 267 Wis. 481, 483–484, 66 N.W.2d 333, 335, this court stated:

> 'This court held in the [State ex rel. City of Madison v.] Walsh [247 Wis. 317, 19 N.W.2d 299] case, supra, in effect, that annexation proceedings must be conducted with reasonable dispatch

> and completed within a reasonable time. In the absence of legislation fixing a maximum time for the completion of annexation proceedings we cannot fix an arbitrary time therefor, or we would be legislating. We can and do say, however, that annexation proceedings once commenced must be conducted and completed within a time that is reasonable in view of all of the circumstances. The only legislative expression upon the matter since the decision in the Walsh case is that the statute was amended to require that the circulation of petitions for annexation must be commenced within twenty days after the date of posting rather than forty-five days as permitted prior to the amendment. This is an indication at ****501** least that the legislature favors a prompt conclusion of annexation proceedings.'

***220** In Village of Brown Deer v. City of Milwaukee (1956), 274 Wis. 50, 64, 79 N.W.2d 340, 348, the following appears:

> 'We hold that this annexation, if otherwise valid and if pressed in good faith and completed within a reasonable time, will be effective as an annexation to Brown Deer and withdrawn from the consolidation.'

We are persuaded that the city of Milwaukee failed to pursue the Schroedel-West annexation within a reasonable time, and the ordinance must be declared invalid.

Those portions of the judgment adjudging as invalid the Corrigan annexation (Ordinance No. 31 of the village of Brown Deer), the Brown Deer Park annexation (Ordinance No. 35 of the village of Brown Deer), the Laun annexation (Ordinance No. 53 of the village of Brown Deer) and the Schroedel-West annexation (Ordinance No. 631 of the city of Milwaukee) are affirmed. That portion of the judgment adjudging as valid the Tripoli annexation (Ordinance No. 32 of the village of Brown Deer) is affirmed. That portion of the judgment adjudging as valid the Johnson annexation (Ordinance No. 34 of the Village of Brown Deer) is reversed. No costs will be allowed upon this appeal.

DIETERICH, J., took no part.

CURRIE, Justice (dissenting in part).

I respectfully dissent from the holding of the majority that a third party may question the binding effect upon a corporation of a written instrument executed by its president in the corporate name, be it a contract, or a petition addressed to some public body. Furthermore, as applied to the facts relating to the signing of the annexation petitions by the two corporations in question, Evert Container Corporation and Good Hope Investment Company, I deem the result of this holding to be a serious miscarriage of justice.

***221** Charles Evert, who subscribed the Corrigan tract annexation petition in behalf of the Evert Container Corporation, is the president and majority stockholder of the corporation. Some fo the directors resided outside of Wisconsin and the board of directors and stockholders customarily held only an annual meeting. At this annual meeting of stockholders, they customarily ratified all acts of the officers and directors. Hence, it is clear that Evert Container Corporation established a pattern of conduct which, at least by implication, delegated broad power to the president and clothed him with the apparent authority to represent and bind the corporation in all of its affairs and transactions between annual meetings. There was no evidence that the directors or stockholders ever refused to ratify any act performed by Evert as president during the yearly intervals between meetings. Under rather similar facts in McElray v. Minnesota Percheron Horse Co. (1897), 96 Wis. 317, 71 N.W. 652, this court held that even the corporation was estopped to deny its president's authority to act in a particular matter.

The facts with respect to the Good Hope Investment Company's signature to the Johnson tract annexation petition are even stronger in favor of barring Milwaukee's right to challenge such signature. This corporation holds title to the Brynwood Country Club. President Lewenauer, who subscribed the petition, in behalf of the corporation, discussed the matter informally with the other four directors and obtained their oral approval. After the petition was filed, the

directors held a meeting and formally ratified the signing. Attorney A. L. Sholnik, one of the five directors, testified that, for the most part, the directors transacted their business on an informal basis. Either president Lewenauer or secretary Ritz would telephone the other directors and inform them of any proposed corporate action. The directors would then express their opinion for or against the proposal, and the expression of the majority would govern.

**502 *222 From these facts it is apparent that each corporation desired to join in the annexation petitions. The general rule is clearly established that a third person may not raise the objection that a corporate officer lacked authority to do an act on behalf of the corporation, and thus void the corporate act, if no objection to the act was raised by the corporation. 2 Fletcher, Corporations, p. 523, sec. 490. The apparent theory behind this rule is that the failure of the corporation to object to an unauthorized act done in its behalf constitutes a tacit ratification, and that the policy of the law favors an interpretation which permits parties to rely on acts taken in behalf of corporations.

The majority attempts to distinguish between business acts and political acts of a corporation, and holds that the validity of the latter may be challenged by interested third parties. I see no basis for such a distinction. It would seem that the rationale of the general rule is just as applicable to so-called political acts as it is to strict business acts. Furthermore, what is a political act? Perhaps the instant action was motivated solely by tax considerations. This would make it as much a business decision as would be a decision on any other tax matter. Furthermore, a political act certainly cannot be defined as any transaction in which a corporation deals with a governmental unit. For example, a corporation deals with government when it files written objections, pursuant to sec. 70.47(7), Stats., against the amount or valuation of the assessment made of its property. The filing of written objections is a condition precedent to its right to later bring court action for relief against the assessment. Would the municipality have the right in such court action to question the validity of the written objections, subscribed in the name of the corporation by its president, because the board of directors had not acted by formal resolution, at a regularly held board meeting, or by written informal action, in the manner authorized by sec. 180.91, Stats., to authorize the *223 president to so act for the corporation? Following the reasoning of the majority opinion, the answer is 'yes.'

The majority attempts to justify its distinction by analogy. It states that Milwaukee could challenge the legal title of a person who signed an annexation petition as an owner of real estate, and thus should be able to challenge corporate ownership in a similar manner. This is certainly true. But the city presently can challenge the corporation's title to its real estate without attacking its validity to act. Traditionally, the title of a corporation to property may be challenged by one without the corporate structure, while only the corporation, or one acting in its behalf, has the right to challenge the authority of a managing officer to act for the corporation.

Statutory requirements that a corporation must follow a certain specified procedure, in authorizing action by its president, are made for the protection of the corporation and its shareholders, not as a sword to be used by a third party such as the city of Milwaukee in this action.

The majority concludes that the only way informal corporate action may legally be taken is by strict adherence to the provisions of sec. 180.91, Stats. That statute reads in part that: 'Any action required * * * to be taken at a meeting, * * * may be taken without a meeting if a consent in writing setting forth the *action so taken* shall be signed by all * * * entitled to vote with respect to the subject matter thereof.' (Italics supplied.) A reasonable interpretation of this statutory language permits the construction that the consent may be signed *after* the action has been taken. Such a construction is more in keeping with the practicalities of corporate action and with the realities of present corporation practice. Here each corporation subsequently ratified its president's act.

The basic decision really boils down to a policy determination. The majority decided in favor of a policy permitting *224 interested third parties to attack the authority **503 of corporate officers who have acted on behalf of their corporation, where the action has not been attacked by the corporation. It also decided that the only way such action can be taken is by strict adherence to the statutory formalities. The result of this decision is to impugn the ability of both third parties and members of a corporation to rely on acts of corporate officers. The social utility of definiteness of corporation action outweighs the utility of letting a city utilize every insignificant flaw to avoid an annexation. As technical as annexation proceedings now are, it would seem better to look to substance rather than strictly to form.

The better rule would be that an annexation petition, signed in behalf of a corporation landowner by its chief executive officer, is binding on the corporation, unless attacked by the corporation or its shareholders prior to the expiration of the

90 day limitation period provided by sec. 62.07(3), Stats., 1955. Therefore, I would hold that the city of Milwaukee has no right in this action to challenge the signatures to the petitions of Evert Container Corporation and Good Hope Investment Company. This would require that the trial court's judgment upholding the Johnson tract annexation be affirmed, and that the validity of the Corrigan tract annexation be determined on the other issues mentioned but not passed upon by the majority opinion.

I am authorized to state that Mr. Justice HALLOWS concurs in this opinion.

All Citations

16 Wis.2d 206, 114 N.W.2d 493

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Exhibit 19

KeyCite Yellow Flag - Negative Treatment
Distinguished by Stone v. Frederick, N.Y.A.D. 3 Dept., December 11, 1997

6 N.Y.2d 344
Court of Appeals of New York.

WEST VIEW HILLS, INC., Respondent,
v.
LIZAU REALTY CORP. et al., Appellants.

July 8, 1959.

Synopsis

Plaintiff corporation action against defendant corporation and officers and stockholders thereof to recover amount which it was wrongfully and improperly required to pay for work, labor and services entering into construction of building owned and built by defendant corporation. Defendants moved to set aside service of process and dismiss complaint. The Supreme Court at Special Term, Samuel Rabin, J., entered order denying motion and defendants appealed. The Appellate Division of the Supreme Court in the Second Judicial Department, 6 A.D.2d 844, 175 N.Y.S.2d 879, affirmed and defendants appealed by permission of Appellate Division. The Court of Appeals, Dye, J., held that notwithstanding lack of specific enumeration of power in articles of incorporation or bylaws, under circumstances, president of plaintiff at time action was originally instituted had power as president to institute action on behalf of corporation.

Affirmed.

Froessel, J., and Conway, C. J., dissented.

West Headnotes (2)

[1] **Corporations and Business Organizations**
⇐ From customary duties or acts or nature of office

President of corporation has presumptive authority in discharge of his duties to defend and prosecute suits in name of corporation, even though such power is not enumerated in articles of incorporation or bylaws.

18 Cases that cite this headnote

[2] **Corporations and Business Organizations**
⇐ Conduct of litigation

Where president of plaintiff corporation brought action against defendant corporation and officers thereof who were identical to officers of plaintiff corporation, claiming that plaintiff corporation had been wrongfully and improperly required to pay for work, labor and services entering into construction of apartment building owned and built by defendant corporation and that individual defendants were about to dissolve defendant corporation and to distribute its assets among themselves as the sole remaining stockholders, under circumstances, president of plaintiff corporation had power to institute action on behalf of plaintiff corporation.

20 Cases that cite this headnote

Attorneys and Law Firms

***864 **623 *345** Richard A. Brown, New York City, for appellants.

Benjamin Paul Goldman, New York City, for respondent.

Opinion

***346** DYE, Judge.

[1] In this appeal, by permission, the question posed is whether the president of the plaintiff corporation, at the time the action was originally instituted, had the power, as president, to institute the action on behalf of the corporation. In answering such question in favor of the plaintiff both Special Term and the court below correctly applied the accepted principle that when there has been no direct prohibition 'the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation' (Rothman & Schneider v. Beckerman, 2 N.Y.2d 493, 497, 161 N.Y.S.2d 118, 121, 64 A.L.R.2d 895; Matter of Paloma Frocks (Shamokin), 3 N.Y.2d 572, 170 N.Y.S.2d 509, 65 A.L.R.2d 1317; Twyeffort

v. Unexcelled Mfg. Co., 263 N.Y. 6, 188 N.E. 138; Hardin v. Morgan Lithograph Co., 247 N.Y. 332, 160 N.E. 388).

This is as it should be for unless the president actually or impliedly possesses such power the corporate interests may be prejudiced if not entirely destroyed. While, ordinarily, the powers of the president of a corporation are often enumerated either in the articles of incorporation or in the by-laws, it is not usual to find in them any reference to the power to defend or institute litigation in the name of the corporation. However, such an omission does not mean that the power is nonexistent for, in situations requiring the exercise of such power to preserve and protect the interests of the corporation, it will be implied. This case presents such a situation.

According to the complaint, the allegations of which we assume to be true, as and for a first cause of action, the plaintiff alleges that it had been wrongfully and improperly required to pay for work, labor and services entering into the construction of the Forest Hills apartment, owned and built by the defendant Lizau Realty Corp., amounting to approximately $200,000. For a second cause of action, the plaintiff alleges ****624** that the individual defendants had, by their wrongful and improper conduct in ***347** connection with the building of such apartment, violated their fiduciary duties as directors and officers of the plaintiff corporation; that the apartment house having been sold, the said individual defendants had or are about to cause the dissolution of Lizau Realty Corp., and to distribute its assets among themselves as the sole remaining stockholders. The president of West View, under the circumstances, would not have been justified in postponing action until such time as the board had *****865** affirmatively authorized commencement of suit. According to the complaint, they had their own selfish interests to protect which were contrary to the interests of the corporation. While there is no danger of a deadlock, as in Rothman, supra, the principle is the same in either event for it is the corporation whose interests are affected, and it was for the purpose of protecting and preserving the corporate interest that prompted the president to institute this suit.

We point out that in Rothman, supra, which dealt with an internal problem between equally divided interests in a close corporation, we recognized that a corporation is a separate, independent legal entity notwithstanding that, for convenience, the parties managed the corporation in disregard of accepted corporate procedures, much in the manner of a partnership. Here, the necessity of recognizing that a corporate entity has independent, separate legal rights is even more emphatic. Allegedly, West View had been charged with and required to pay for construction costs incident to a building in which it had no interest. The coincidence that the plaintiff and defendant corporations were owned by the same individuals who, in turn, constituted the respective boards of directors makes it even more imperative to recognize that West View, as a corporation, has an independent and separate cause of action.

This is not the classic situation requiring resort to a stockholders' derivative action to protect minority interests. To be sure, President Zaubler, as an individual stockholder, is now in the minority, but that fact does not deprive him of his right and duty to perform the obligations and functions of his office as president, nor does it prevent the corporation, as a corporation, from commencing an action in its own behalf simply because a majority of its board of directors are in a position to withhold authorization.

***348** Our holding in Sterling Ind. v. Ball Bearing Pen Corp., 298 N.Y. 483, 490, 84 N.E.2d 790, 793, 10 A.L.R.2d 694, is not authority to the contrary, for there the holding was dictated by the circumstances of that case, since 'Any actual or implied authority which (the president) may have had as president' to bring suit was effectively 'terminated when * * * the board * * * refused to sanction it'. Thus, Sterling does not hold that under all circumstances the president is without authority to institute or defend litigation in the name of the corporation unless actually so authorized. Here the board has taken no action, since the parties limited the within issue to the question of the president's power to initiate the litigation in the name of West View, they having stipulated that the present directors would take no further action in the premises pending the determination of that issue.

*****866** **[2]** Absent a provision in the by-laws of action by the board of directors prohibiting the president from defending and instituting suit in the name of and in behalf of the corporation, he must be deemed, in the discharge of his duties, to have presumptive authority to so act. Under these circumstances, the within action was properly instituted by the president in the name of the corporation, in the exercise of his implied authority to protect and preserve the interest of the plaintiff corporation. The fact that the corporation was inactive for several years in no way serves to relieve or excuse him from duty.

The order appealed from should be affirmed, with costs, and the question certified answered in the affirmative.

**625 FROESSEL, Judge (dissenting).

The majority of the court is now holding that a minority stockholder, merely because he was president of a corporation, may now sue, upon the theory of implied authority and in the name of the corporation, the majority stockholders who are the two remaining directors. Such a decision in our opinion runs counter to the basic principles of corporate law and holds in effect that a corporation is to be managed by its president and not by its board of directors.

In three previous decisions, we passed upon the authority of the president (or secretary-treasurer who had all the powers normally devolving upon a president) to institute legal or arbitration proceedings, without first obtaining specific approval from the board of directors (*349 Sterling Ind. v. Ball Bearing Pen Corp., 298 N.Y. 483, 84 N.E.2d 790, 10 A.L.R.2d 694; Rothman & Schneider v. Beckerman, 2 N.Y.2d 493, 161 N.Y.S.2d 118, 64 A.L.R.2d 895; Matter of Paloma Frocks (Shamokin), 3 N.Y.2d 572, 170 N.Y.S.2d 509, 65 A.L.R.2d 1317). In all those cases, however, the directors were evenly split and corporate management was thus deadlocked. In authorizing the secretary-treasurer to bring suit in Rothman, and the president to institute arbitration proceedings in Paloma Frocks, the unarticulated premise was that in a deadlock situation corporate management is paralyzed and the need for allowing the president to institute a corporate suit, especially against 'outsiders', is often urgent.

In the instant case, the president of a corporation which has been inactive for some four years seeks to prosecute an action in the name of the corporation against the individual defendants, who were two-thirds owners and constituted a majority of the board of directors, and against the corporate defendant, of which he was president and one-third owner and in which he sold his interest to the individual defendants. The authority to prosecute such an action must be either (1) actual, (2) apparent or (3) implied. There can be no question of actual authority, ***867 since a majority of the board of directors are defendants and obviously opposed to the suit, and the corporate by-laws do not authorize a single officer to institute suit on behalf of the corporation. Nor can there be apparent authority, since (as we noted at page 490 of 298 N.Y., at page 792 of 84 N.E.2d in the Sterling case) no rights of outsiders or third parties are involved. Thus the authority, if any, must be implied, i. e., presumptive or prima facie authority by virtue of the office of president.

In finding such presumptive authority, Special Term relied principally on a quotation from the Rothman case (2 N.Y.2d 493, 497, 161 N.Y.S.2d 118, 121, supra), reaffirmed in Paloma Frocks (3 N.Y.2d 572, 575-576, 170 N.Y.S.2d 509, 511-512, supra), that 'Where there has been no direct prohibition by the board, then, it has been held, the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation.' However relevant the absence of direct prohibition may be in a deadlock situation, it can hardly be decisive where the president has actual knowledge that a majority of the board of directors oppose the suit. To consider it decisive would be to exalt form above substance to a degree never countenanced by this court. There can never be implied authority in a president to bring *350 suit in the name and on behalf of a corporation where a majority of those entrusted by law with its management unquestionably oppose such action. This is especially so when the president seeks to use the corporation to sue, not outsiders, but those who constitute a majority of the board of directors.

The majority opinion states that 'it was for the purpose of protecting and preserving the corporate interest that prompted the president to institute this suit', and that he was not required to wait 'until such time as the board had affirmatively authorized commencement of suit' (which obviously it would never have done), because the majority of the board 'had their own selfish interests **626 to protect which were contrary to the interests of the corporation'. But who is this corporation whose cause of action the majority of the court seek to preserve? It is three men, each of whom owns one third of the stock and each of whom is an officer and member of the board. If the two would withhold consent to this suit because of 'their own selfish interests', is it not equally apparent that the third is bringing suit for his own selfish interests? Who could possibly benefit from this action except plaintiff as the minority member of the corporation? It is perfectly obvious that it was his own personal selfish interests 'that prompted (him as) the president to institute this suit' on behalf of a corporation which has done no business whatsoever for several years.

To hold, under these circumstances, that the 'corporation is a separate, independent legal entity' with rights of its own is to ignore the ***868 express mandate of section 27 of the General Corporation Law, Consol.Laws, c. 23, to wit: 'The

business of a corporation shall be managed by its board of directors' and not by its president and to close our eyes to stark reality. The president did not need a resolution from the board of this inactive corporation to know that he was not authorized to bring this action and, in prosecuting it in the face of the opposition of the board, the president was violating his duty as a corporate officer.

As we noted at page 493 of 298 N.Y., at page 794 of 84 N.E.2d, 10 A.L.R.2d 694 of the Sterling decision, supra, plaintiff's proper remedy was a stockholder's derivative suit. He was president and director of this corporation when all the acts of the two directors, of which he now complains, took place. He sold his interest in 10 active corporations, including defendant corporation, to the individual defendants for a sum approximating ***351** half a million dollars, and the only apparent reason why his stock in plaintiff corporation was not purchased was that it was valueless. It seems clear that he is now seeking for his sole benefit to use plaintiff corporation as an instrumentality against the majority of stockholders and directors in order to siphon money from a corporation in which he sold his interest to one in which he still retains an interest, and which was dormant and without assets. What he would be barred by estoppel from complaining of in a stockholder's action, he has been permitted to do by way of a 'president's suit'.

Special Term also relied upon the fact that 'a course of conduct developed through the years * * * whereby Zaubler, as plaintiff's president, acted as spokesman and directive head of the corporation in all its activities, including litigation.' But there is a basic distinction between suits, in the name of the corporation, against outsiders, and suits against insiders, especially where the insiders constitute a majority of the board of directors. In Rothman (supra, 2 N.Y.2d at page 499, 161 N.Y.S.2d at page 123, 64 A.L.R.2d 895) we emphasized the fact that 'the defendants before us, complete strangers to the corporation and actually charged with coverting a portion of its assets, should not be permitted to question his authority and thereby frustrate the action.' (Emphasis supplied.) And in Fanchon & Marco v. Paramount Pictures, 202 F.2d 731, 733, 36 A.L.R.2d 1336, the Second Circuit Court of Appeals wrote: 'It may be agreed that a president may authorize normal litigation without thereby finding justification for an action against the single other stockholder which will obviously disrupt corporate activities until terminated and which is known to be opposed by onehalf the board of directors. The contention relied on seems too farfetched to deserve extended consideration, Sterling Industries, Inc. v. Ball Bearing Pen Corp., 298 N.Y. 483, 84 N.E.2d 790, 10 A.L.R.2d 694'. (Emphasis supplied.)

*****869** In Rothman, supra, we distinguished the Sterling decision, supra, on two grounds: (1) the suit in Sterling was against insiders, and (2) the board, when requested to act in Sterling, refused, by way of a tie vote, to give the president permission to institute suit. Here, the suit, as in Sterling, is not only against insiders but against a majority ****627** of the board, and their refusal to authorize the action against themselves is as obvious as it can be. In Paloma Frocks (supra, 3 N.Y.2d at page 575, 170 N.Y.S.2d at page 511, 65 A.L.R.2d 1317) we distinguished ***352** Sterling not only on the ground that permission had there been refused, but because of the 'more important difference' that the directors had agreed in advance that corporate controversies should go to arbitration, and 'when a dispute did arise the submission thereof by president Bernstein to arbitrators was a routine step in the performance of an authorized contract.'

Not only are we unable to distinguish the instant case from Sterling, but we feel it is far stronger. As we noted in Sterling (supra, 298 N.Y. at page 492, 84 N.E.2d at page 793): 'We have consistently held that section 27 of the General Corporation Law, which provides that the business of a corporation shall be managed by its board of directors, cannot be circumvented. (Citing cases.)' By affirming here, we are, in effect, creating a further exception to our holding in the Sterling case, and are amending section 27 to read that the corporation shall be managed by its board of directors, except when one member of the board, who happens to be president, disagrees with the majority, in which case it shall be managed by the president. We cannot imagine a more drastic departure from basic principles of corporate law.

We would reverse the orders below, grant the motion to set aside the service of the summons and dismiss the complaint, with costs, and answer the certified question in the negative.

DESMOND, FULD, VAN VOORHIS and BURKE, JJ., concur with DYE, J.

FROESSEL, J., dissents in an opinion in which CONWAY, C. J., concurs.

Order affirmed, etc.

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