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Hopkins , et al v. The Pen-Mar Club

RAYMOND HOPKINS, JR., and
DHIMITRA S. DAVENPORT, Plaintiffs,
v. THE PEN-MAR CLUB,
also known as THE PEN-MAR CLUB, INC., Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Civil Action — Law, No. 90 of 2003–C

Demurrer; Nonprofit Corporation Law; Receiver pendente lite and/or liquidating receiver

1. The court need not dismiss an action by expelled club members for reinstatement and removal of board of directors simply because it was filed in the civil division rather than the orphans' court division, nor must the court transfer the case from one division to another in order to address the case's merits.
2. Where the Nonprofit Corporation Law allows the court to remove a board of directors which has engaged in fraud or gross abuse of authority with regard to the corporation, club members who allege that their expulsion was the result of personal animosity, slander, and manipulation of the corporation's voting procedures have pled sufficient facts to overcome a demurrer.
3. Where the Nonprofit Corporation Law allows the court to appoint a receiver pendente lite and a liquidating receiver to dissolve the corporation, but the plaintiffs plead insufficient facts to warrant those forms of relief, the court will give the plaintiffs an opportunity to amend the complaint to plead additional facts in support of those remedies.

Appearances:

J. McDowell Sharpe, Esq., *Counsel for Plaintiffs*

Rees Griffiths, Esq., *Counsel for Defendant*

OPINION

Herman, J., September 10, 2003

Introduction

Before the court are the defendant's preliminary objections in the nature of demurrers to the plaintiffs' complaint. The action arises out of the plaintiffs' expulsion from membership in the defendant corporation, a private nude recreation club located in Warfordsburg, Fulton County. The court agreed to decide the objections on written argument without the need for oral argument. The parties having filed their briefs, this matter is ready for decision.

Discussion

The plaintiffs allege the defendant's board of directors expelled them from the club in a manner contrary to the club's constitution and by-laws, as well as the Pennsylvania Nonprofit Corporation Law of 1988, 15 Pa.C.S.A. §§5101, et seq. They seek reinstatement as club members, removal of the directors, the appointment of a custodian or receiver pendente lite, and the eventual dissolution of the club.

In its first demurrer, the defendant contends this reinstatement action should have been filed in orphans' court rather than the civil division under 15 Pa.C.S.A. §5793(a). That section provides: "**Upon petition** of any person whose status as...a member...of a nonprofit corporation...may be affected by any corporate action, the court may hear and determine the validity of such corporate action." (Emphasis supplied.) The defendant cites *In re The Lord's New Church*, 817 A.2d 559 (Pa.Cmwlt. 2003), *appeal granted and reversed in part on other grounds*, 826 A.2d 863 (Pa. June 19, 2003). In that case, the plaintiffs were church members who filed an orphans' court action seeking judicial review under the Nonprofit Corporation Law of what they alleged was a conspiracy by the church directors to take control of the church's assets.

New Lord's Church does not provide a basis for dismissal of the instant action because the question of which division of the court was the appropriate one in which to bring an action seeking relief under the Nonprofit Corporation Law was not an issue before the court. By contrast, Pennsylvania Rule of Judicial Administration 2156 provides:

In addition to other matters which by law are to be heard and determined by the orphans' court division of a court of common pleas, the division shall hear and determine the following matters:

(1) **Nonprofit Corporations.** The administration and proper application of property committed to charitable purposes held or controlled by an domestic or foreign nonprofit corporation and all matters arising under Title 15 of the Pennsylvania Consolidated Statutes (relating to corporations and unincorporated associations) or otherwise where is drawn in question the application, interpretation or enforcement of any law regulating the affairs of nonprofit corporations holding or controlling any property committed to charitable purposes, or of the members, security holders, directors, officers, employees or agents thereof, as such.

This section defines "property committed to charitable purposes" as "all property committed to the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes, the accomplishment of which is beneficial to the community...." In no sense can the defendant be considered a corporation formed to accomplish charitable purposes within the meaning of Pa.R.J.A. 2156.

Disputes involving nonprofit corporations have been addressed without challenge in the civil division of courts of common pleas rather than the orphans' court division even where such corporations **could** be considered "charitable" under Pa.R.J.A. 2156. For example, in *Lewis v. Pennsylvania Bar Association*, 701 A.2d 551 (Pa. 1997), members of the state bar association sued the association and its president for access to that corporation's records. The action was filed and heard in the trial court's civil division even though the association could reasonably be considered a charitable corporation insofar as it is dedicated to a purpose "beneficial to the community" under Pa.R.J.A. 2156(1). Likewise, in *Gee v. Blue Stone Heights Hunting Club*, 604 A.2d 1141 (Pa.Cmwlt. 1992), the civil division presided without challenge over a dispute involving a corporation which promoted the ideals of sportsmanship through the activities of hunting and fishing, ideals which arguably benefit the community at large. *Id.* at 1143. Nor was a similar challenge made with regard to the trial court's civil division deciding a case involving a corporation which consisted of mental health professionals providing services to children and families, arguably a charitable purpose under Pa.R.J.A. 2156(1) insofar as it sought to promote community stability through mental health. *White v. Associates in Counseling and Child Guidance, Inc.*, 767 A.2d 638 (Pa.Cmwlt. 2001).

We here keep in mind that a demurrer is a challenge to the legal sufficiency of a claim. The party asserting the demurrer admits as true all well-pleaded, material, relevant facts contained in the complaint, as well as every inference fairly deducible from those facts, yet argues that even accepting those facts as true leaves the plaintiff with no entitlement to relief under any theory of law. The court should sustain a demurrer only in cases which clearly fail to state a claim for which relief may be granted. If any doubt exists under the law as to whether the court should sustain the demurrer, the court must overrule it. *Willet v. Pennsylvania Medical Catastrophic Loss Fund*, 702 A.2d 850 (Pa. 1997).

There is no support for the defendant's contention that the complaint must be dismissed because the plaintiffs did not proceed by a petition to the orphans' court division but chose instead to file a civil action. Dismissal is an extreme remedy not warranted under the standards which govern demurrers. Nor is it necessary to transfer this case to orphans' court. According to Pennsylvania Orphans' Court Rule 3.1, orphans' court procedures should (with certain exceptions) conform to the procedures used in equity cases, with equity procedures in turn generally conforming to rules pertaining to civil actions. Pa.R.C.P. 1501. The defendant has not shown how allowing this matter to proceed in the civil division would

undermine the court's ability to address the substantive issues raised in the complaint. Therefore the court will overrule this first demurrer.

The second demurrer is to the plaintiffs' request that the court remove the board of directors pursuant to §5726(c) of the Nonprofit Corporation Law. That section provides: "The court may, upon petition of any member of director, remove from office any director in case of fraudulent or dishonest acts, or gross abuse of authority or discretion with reference to the corporation, or for any proper cause, and may bar from office any director so removed for a period prescribed by the court. The corporation shall be made a party to such action." The defendant argues the plaintiffs have failed to plead facts which trigger application of this section so as to justify the extreme remedy of removing either the entire board of directors or particular board members. Specifically the complaint does not aver fraudulent or dishonest conduct with regard to the corporation. We disagree.

The complaint avers that the plaintiffs' expulsion from the corporation was the result of personal animosity by certain board members who made slanderous accusations against the plaintiffs in an effort to induce other board members to vote in favor of expulsion. The complaint further avers that the board leadership deliberately manipulated the meeting and voting process so as to ensure the plaintiffs' expulsion, used the corporation's newsletter to falsely accuse them of criminal acts against the club, and reneged on its agreement to follow the mediation procedures recommended by two affiliated associations which advocate nudism and/or sunbathing. We find these averments, which we must accept as true for purposes of ruling on this demurrer, can reasonably be construed as fraudulent or dishonest.

The defendant also argues the complaint fails to plead facts which show it committed "a gross abuse of authority or discretion with reference to the corporation." The defendant contends that any abuse of discretion which may conceivably have occurred did not occur "with reference to the corporation" because only the **plaintiffs** were alleged to be adversely affected by the board's decision, not the corporation.

The complaint avers that the board's termination of the plaintiffs' membership was unlawful under the Nonprofit Corporation Law and the corporate by-laws in various respects. Specifically the plaintiffs allege: (1) there was no written complaint made about the plaintiffs to the board; (2) no timely investigation or written report was made; (3) the board did not discuss the recommendation of expulsion with the plaintiffs; (4) the plaintiffs were not given the right to bring the matter to a vote, and instead another member did so at a time when the plaintiffs could not be present; (5) the plaintiffs were not provided with timely notice of the special board meeting to consider their expulsion; (6) the complaint against the plaintiffs was not kept confidential and misinformation was provided to other club members about the matter; (7) the plaintiffs were expelled merely because they complained to the board, sought legal advice about their rights and responsibilities, and also complained to the American Association for Nude Recreation, an affiliate of the defendant. The complaint avers that the plaintiffs violated no by-law and, as discussed above, that the board engaged in other actions which show its members were motivated solely by personal animosity toward the plaintiffs. We find these averments can reasonably be considered a gross abuse of authority or discretion under §5726(c) such that the complaint withstands this demurrer.

Furthermore, there is no authority for the defendant's contention that the board's actions were not "in reference to the corporation" merely because they harmed only the plaintiffs and did not appear to harm the corporation itself. According to the facts averred, any wrongdoing occurred in the context of the corporation's affair and members. We therefore cannot say with certainty the plaintiffs have no legal right to proceed past the preliminary objection stage under §5726(c); *Willet, supra*.

The defendant's third demurrer is to the plaintiffs' request for the court to appoint a receiver pendente lite to run the affairs of the corporation and a liquidating receiver to dissolve the corporation pursuant to §§5984 and 5985 of the Nonprofit Corporation Law.

Section 5984 authorizes the court to appoint a receiver pendente lite to preserve corporate assets and carry on day-to-day business until a full hearing can be held. Section 5985 authorizes the court to appoint a liquidating receiver after a hearing. The court can order the involuntary dissolution of a corporation where "the acts of the directors, or those in control of the corporation, are illegal, oppressive, or fraudulent, and that it is beneficial to the interests of the members that the corporation be wound up and dissolved." §5981(2).

In addition, although not specifically included in the complaint's wherefore clause, the plaintiffs in the alternative seek the appointment of a custodian under §5764. That section allows the court to appoint a custodian where "any of the conditions specified in section 5981...exists with respect to the corporation."

A custodian appointed under this section shall have all the power and title of a receiver appointed under...chapter 59 (relating to involuntary liquidation and dissolution), but the authority of the custodian shall be to continue the business of the corporation and not to liquidate its affairs and distribute its assets,

except when the court shall otherwise order and except in cases arising under section...5981(2)....

Section 5981(2) requires illegal, oppressive or fraudulent conduct, **and** that a liquidating receiver is necessary for the best interests of the members of the corporation. The plaintiffs and this court interpret "best interests of the members" as meaning the best interests of **all** members of the corporation, not just an aggrieved few.

The complaint avers that the plaintiffs, having been problem-free members of the defendant club for many years and having previously leased another lot from the club without incident, leased a lot from the defendant on which they placed a camper. The plaintiffs intended this to be their retirement and semi-permanent home. The lease arrangement was a benefit of the plaintiffs' club membership. However, according to the complaint, the board's termination of that membership undermines the plaintiffs' ability to utilize the lot and camper as anticipated, and as such, is oppressive. The plaintiffs do not explain why or how the termination of their membership threatens their rights under the lease agreement. Nor do they state clearly why reinstatement of their membership would be an inadequate remedy.

The appointment of a custodian or a receiver pendente lite is a drastic emergency remedy appropriate only where the corporation is in imminent danger of injury or dissipation. The court will not impose that remedy where a less drastic one is available at law. *Northampton National Bank of Easton v. Piscanio*, 379 A.2d 870 (Pa. 1977). After reviewing the complaint's allegations as a whole, we are constrained to agree with the defendant that the averments, even when accepted as true, do not at this time support relief in the nature of appointment of a custodian, receiver pendente lite, and a liquidating receiver. The plaintiffs have not pled sufficient facts which indicate that dissolving the corporation is in the best interest of **all** its members, as required by §5981(2). Under these circumstances, the court will give the plaintiffs an opportunity to plead additional facts, if they exist, by way of an amended complaint.

ORDER OF COURT

Now this 10th day of September 2003, the court overrules the defendant's demurrer to the plaintiffs' filing of this action in the court's civil division as opposed to the orphans' court division; the court overrules the defendant's demurrer to the plaintiffs' claim for relief in the nature of the removal of the defendant's board of directors; further, the court grants leave to the plaintiffs to amend the complaint to plead facts to support their claim for the appointment of a custodian, receiver pendente lite, and a liquidating receiver.

The plaintiffs must file the amended complaint no later than twenty (20) days from receipt of this Order and notify the court of its filing. In the event the plaintiffs do not file an amended complaint, the court will enter an appropriate Order.

The complaint also avers that the by-laws are themselves deficient under the Act.