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No. 350380

MAY 15 2017

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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DIVISION III
STATE OF WASHINGTON
By _____

ROY BROOKS STODDARD, in his individual capacity, and as Trustee of
the Roy B. Stoddard Revocable Living Trust, and as a shareholder of S &
N Logging, Inc. and Newman Logging, Inc.,

Appellant,

v.

S & N LOGGING, INC. a Washington Corporation, NEWMAN
LOGGING, INC. a Washington Corporation, and DONALD D.
NEWMAN, an individual, and in his capacity as Trustee of the Don
Newman Revocable Living Trust,

Respondents.

APPELLANT'S OPENING BRIEF

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2. The trial court erred in entering the Order on Defendants' Motion to Dismiss Under CR 12(B)(6) and/or CR 56 of January 3, 2017 granting Defendants' motions to dismiss Plaintiff's action for judicial dissolution of Defendant corporation.

3. The trial court erred in entering the Order on Defendants' Motion to Dismiss Under CR 12(B)(6) and/or CR 56 of January 3, 2017 granting Defendants' motions to dismiss Plaintiff's action for an accounting of the affairs of Defendant corporation.

4. The trial court erred in entering the Order on Defendants' Motion to Dismiss Under CR 12(B)(6) and/or CR 56 of January 3, 2017 granting Defendants' motions to dismiss Plaintiff's derivative action on behalf of the Defendant corporation against the Defendant Donald D. Newman for breach of fiduciary duties for oppressive actions, unlawful dispositions of corporate assets, and refusal to provide corporate business records upon demand by a shareholder.

Issues Pertaining to Assignments of Error

Defendant S & N Logging, Inc. and Newman Logging, Inc. (the same corporation using a different name over time) was administratively dissolved in 2010. In 2015, Plaintiff, asserting his interests as a shareholder in the dissolved corporation, demanded of Defendants the opportunity to inspect the corporation's business records, and demanded an accounting of affairs of the corporation. Defendants declined those demands asserting that Plaintiff was not a shareholder. In 2016, Plaintiff filed his complaint for declaratory judgment, judicial dissolution,

accounting, and derivative actions for breaches of fiduciary duties and unlawful disposition of assets.

1. Does RCW 23B.14.340 bar a declaratory judgment action to determine whether the plaintiff is a shareholder of a corporation that was administratively dissolved more than three years earlier?

2. Does RCW 23B.14.340 bar a shareholder from bringing suit for judicial dissolution of a corporation that was administratively dissolved more than three years earlier?

3. Does RCW 23B.14.340 bar a shareholder from bringing suit for an accounting of the affairs of a corporation that was administratively dissolved more than three years earlier?

4. Does RCW 23B.14.340, RCW 7.24 and or RCW 4.16.005 bar a shareholder from bringing derivative actions against a corporate officer of a corporation that was administratively dissolved more than three years earlier, at least as to conduct occurring within the time bars of RCW 7.24 and or RCW 4.16.005?

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A. ASSIGNMENTS OF ERROR

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Issues Pertaining to Assignments of Error

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B. STATEMENT OF THE CASE

Plaintiff filed a Complaint on October 20, 2016 for declaratory judgment, judicial dissolution, accounting, and derivative actions for breaches of fiduciary duties and unlawful disposition of assets. CP 118 to 126. Defendants filed an Answer with admissions and denials and asserting statutes of limitations, including RCW 23B.14.340, as affirmative defenses, among other affirmative defenses. CP 108-117. Defendants filed a Motion to Dismiss, arguing, among other grounds, that Plaintiff's actions were all time-barred by RCW 23B.14.340, in that the Defendant corporation had been administratively dissolved more than

three years prior the filing of the Complaint and that any derivative claims were barred by that statute and potentially by separate statutes of limitation. CP 93 to 107. The trial court granted Defendants' Motion, dismissing all Plaintiffs' claims by Order on Defendant's Motion to Dismiss entered January 3, 2017, finding that all Plaintiffs claims are barred by the three year survival statute of RCW 23B.14.340. CP 10 to 12. Plaintiff admits that the Defendant corporation had been administratively dissolved more than three years prior the filing of the Complaint. Plaintiff served and filed a timely Notice of Appeal on February 2, 2017. CP 1 to 7.

C. SUMMARY OF ARGUMENT

After administrative dissolution, a corporation continues to exist in order to wind up and liquidate its business and affairs. The three year statutory survival period of RCW 23B.14.340 as to actions on "any remedy available against such corporation" does not apply to a shareholder suit for declaratory judgment as the shareholders standing and ownership of shares, accounting and judicial dissolution to complete the process of winding up and distribution of net assets, or derivative claims in the name of the corporation, because those shareholder actions are

enforcement of the statutory dissolution process, internal to the corporation, not remedies against the corporation.

D. ARGUMENT

This is an action for determination, by declaratory judgment, whether Plaintiff is a shareholder of Defendant corporations, and then, if so, for accounting, dissolution, winding up, and distribution of the corporation's assets pursuant to RCW 23B.14.300, including liquidation of any derivative actions the corporation may hold. RCW 23B.14.300 provides,

“The superior courts may dissolve a corporation: ...

(2) In a proceeding by a shareholder if it is established that:

...

(b) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent;

...

(d) The corporate assets are being misapplied or wasted; or

(e) The corporation has ceased all business activity and has failed, within a reasonable time, to dissolve, to liquidate its assets, or to distribute its remaining assets among its shareholders; ...”

Plaintiff brings this action to ultimately distribute the corporation's remaining assets among its shareholders. On Defendants' Motion to Dismiss, the trial court erroneously held that a shareholder loses all claims

for judicial enforcement of his interests on the same day (three years after administrative dissolution) that all claims against the corporation must have been filed, pursuant to RCW 23B.14.340, which provides,

The dissolution of a corporation either (1) by the filing with the secretary of state of its articles of dissolution, (2) by administrative dissolution by the secretary of state, (3) by a decree of court, or (4) by expiration of its period of duration shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution or arising thereafter, unless action or other proceeding thereon is not commenced within two years after the effective date of any dissolution that was effective prior to June 7, 2006, or within three years after the effective date of any dissolution that is effective on or after June 7, 2006. Any such action or proceeding against the corporation may be defended by the corporation in its corporate name.

The three year claim survival period of RCW 23B.14.340 was adopted 2006 as an amendment to the statutes in RCW 23B.14 prescribing the process of dissolution of a corporation. It was adopted to add a period of three years to the date of administrative dissolution for the filing of third party claims against the corporation for precipitation and resolution as part of the larger winding up and dissolution of the corporation mandated by RCW 23B.14 after an administrative dissolution.

The critical language of RCW 23B.14.340 is to the effect that an action on “any remedy available against such corporation, its directors,

officers, or shareholders” must be brought within three years after administrative dissolution.

RCW 23B.14.340 does not apply to time bar an action for declaratory judgment as to whether a party is a stockholder or not, because that stockholder status survives administrative dissolution completely intact. RCW 23B.14.050. This statute is an abrogation of the common law that dissolution of a corporation amounts to its “death” with vesting of equitable title to corporate property in the shareholders, in the fiduciary trust of the directors.

Shareholders continue to hold all their rights to determination of status by declaratory judgment, judicial dissolution, accounting, and derivative actions after administrative dissolution. RCW 23B.14.050. That statute says the corporation continues to exist for purposes of winding up and liquidation after administrative dissolution. Shareholders may seek judicial administration of the winding down, liquidation, and distribution of assets by judicial dissolution pursuant to RCW 23B.14.300.

The three year statute of repose is designed to resolve outstanding claims against the corporation so that winding down may be completed and net assets liquidated for distribution to shareholders. It makes no sense to say that shareholder must file legal action to judicially wind up and dissolve the corporation by the very same day, three years after

administrative dissolution, that a third party creditor could file a timely action against the corporation, which would still require litigation and resolution before winding up and distribution of net assets could be made.

An appellate court reviews questions of statutory construction *de novo*. *State v. Roggenkamp*, 153 Wash.2d 614, 621, ¶ 9, 106 P.3d 196 (2005). The examination begins with the language of the statute and related statutes to determine whether plain statutory language shows the intended meaning of the statute in question. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682, 80 P.3d 598 (2003); *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 11, 43 P.3d 4 (2002). If this examination leads to a plain meaning, that is the end of the inquiry. If, however, the statutory language is amenable to more than one reasonable interpretation, a court may then resort to legislative history, principles of statutory construction, and relevant case law to resolve the ambiguity and ascertain the meaning of the statute. *Rest. Dev.*, 150 Wash.2d at 682, 80 P.3d 598. *Ballard Square Condominium Owners Ass'n v. Dynasty Construction Co.* 158 Wash.2d 603, 612, 146 P.3d 914 (2006).

The critical texts of RCW 23B.14.050¹, describing the continuing existence of a corporation after dissolution, and RCW 23B.14.340, granting three years of survival for claims against the corporation after dissolution, were adopted in 2006 in the same bill, Senate Bill 6596.

Senate Bill 6596, as passed, provided, in part, (amendments shown with strike-through and underlined is in the original)

Sec. 8. RCW 23B.14.050 and 1989 c 165 s 158 are each amended to read as follows:

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

(a) Collecting its assets;

(b) Disposing of its properties that will be applied toward satisfaction or making reasonable provision for satisfaction of its liabilities or will otherwise not be distributed in kind to its shareholders, but in any case

¹ RCW 23B.14.050 “Effect of dissolution.

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

(a) Collecting its assets;

(b) Disposing of its properties that will be applied toward satisfaction or making reasonable provision for satisfaction of its liabilities or will otherwise not be distributed in kind to its shareholders, but in any case subject to applicable liens and security interests as well as any applicable contractual restrictions on the disposition of its properties;

(c) Satisfying or making reasonable provision for satisfying its liabilities, in accordance with their priorities as established by law, and on a pro rata basis within each class of liabilities;

(d) Subject to the limitations imposed by RCW 23B.06.400, distributing its remaining property among its shareholders according to their interests; and

(e) Doing every other act necessary to wind up and liquidate its business and affairs.”

subject to applicable liens and security interests as well as any applicable contractual restrictions on the disposition of its properties:

(c) ~~((Discharging))~~ Satisfying or making reasonable provision for ~~((discharging))~~ satisfying its liabilities, in accordance with their priorities as established by law, and on a pro rata basis within each class of liabilities;

(d) Subject to the limitations imposed by RCW 23B.06.400, distributing its remaining property among its shareholders according to their interests; and

(e) Doing every other act necessary to wind up and liquidate its business and affairs.

Sec. 17. RCW 23B.14.340 and 1995 c 47 s 5 are each amended to read 35 as follows:

The dissolution of a corporation either~~((:))~~

(1) by the filing ~~((by))~~ with the secretary of state of its articles of dissolution,

(2) by administrative dissolution by the secretary of state,

(3) by a decree of court, or

(4) by expiration of its period of duration shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution ~~((#))~~ or arising thereafter, unless action or other proceeding thereon is not commenced within two years after the effective date of ~~((such))~~ any dissolution that was effective prior to the effective date of this section or within three years after the effective date of any dissolution that is effective on or after the effective date of this section. Any such action or proceeding against the corporation may be defended by the corporation in its corporate name.

The legislative histories of RCW 23B.14.050 and RCW

23B.14.340 show the amendments were adopted in an effort to address the

Court of Appeals' opinion in *Ballard Square Condominium Owners Ass'n v. Dynasty Construction Co.*, 126 Wash.App. 285, 295-96, 108 P.3d 818 (2005), *aff'd on other grounds*, 158 Wash.2d 603, 146 P.3d 914 (2006).

In *Ballard*, a condominium homeowners association sued Dynasty, the developer and builder, for breach of contract in 2002, although Dynasty had been administratively dissolved in 1995. The trial court and the Court of Appeals had held that a third party legal action (a breach of contract action in that case) could not be made against an already administratively dissolved corporation, because the common law rule of death of a dissolved corporation applied. That holding was what the Washington legislature wanted to change, so as to allow claims to be filed for a three year period after administrative dissolution. After SB 6596 was passed into law, on review, the Supreme Court did not adopt the Court of Appeal's holding, and instead held that a postdissolution the breach of contract action could have been made under the pre-2006 statutes, but not after the adoption of the retroactive effect of the 2006 amendments.

It is important to note that the survival statute amendments were made and intended to provide statutory legal remedies for third-party claimants against an administratively dissolved corporation, in response the Court of Appeals decision in *Ballard* that none existed in common law

– not to put a time bar on assertion of shareholder rights and claims that existed statutorily since 1989 under RCW 23B.14.050 – and not to address the Supreme Court’s later (i.e. after the amendments were adopted) ruling in *Ballard* that the retroactive effect of the 2006 amendments barred the third-party breach of contract claim in that case even though the action was filed before 2006.

RCW 23B.14.050 is identical to § 14.05 of the national Model Act. Revised Model Bus. Corp. Act § 14.05 (1985) (RMBCA). The Washington legislature did not officially adopt the comments to the 1984 Model Act, but the comments were published in the Senate Journal. Thus, they may be submitted as persuasive authority. The comments provide:

“Proposed subsection 14.05(a) [former RCW 23B.14.050(1)] provides that dissolution does not terminate the corporate existence but simply requires the corporation thereafter to devote itself to winding up its affairs and liquidating its assets; after dissolution, the corporation may not carry on its business except as may be appropriate for winding-up.

The Proposed Act uses the term "dissolution" in the specialized sense described above and not to describe the final step in the liquidation of the corporate business. Ballard Square Condominium Owners Ass'n v. Dynasty Construction Co. 158 Wash.2d 603, 623, 146 P.3d 914 (2006). (emphasis in the original)

The House Bill Report for Senate Bill 6596 recites, in the unopposed “Testimony For:, that:

“The original Revised Model Act was adopted in 1989 in place of the Model Act that had been law in this state since the 1960s. The drafters of the Revised Model Act announced at that time that they were reconsidering the dissolution provisions, so we left some of the dissolution provisions that were already in the Model Act in place and adopted the rest of the Revised Model Act. This worked reasonably well for a while, but in the late 1990's there were some court decisions, including *Ballard Square* last year, which was very well reasoned but reached a nonsensical result: if you dissolve a corporation, a claim arising after dissolution has nowhere to go.”

Ballard's decision and analysis as to the claims of third parties, and the legislature's response to *Ballard*, by extending rights of third party claimants for three years after administrative dissolution, does not apply to Appellant's legal rights and claims, as a corporation shareholder, that his standing as a shareholder may be judicially determined by a declaratory judgment action, that as a shareholder he may bring suit for judicial dissolution under RCW 23B.14.300, and that as a shareholder he may assert a derivative claim for accounting against the officers of the corporation to account for failure to distribute the net assets of the administratively dissolved corporation or for the unlawful distributions of corporation assets to themselves. Shareholder rights, which expressly continue completely intact after an administrative dissolution, were not the subject of *Ballard* and not the subject of the three year survival period that the legislature adopted in response to *Ballard*.

“RCW 23B.14.050(2) expressly reverses all of these common law attributes of dissolution and makes clear that the rights, powers, and duties of shareholders, the directors, and the registered agent are not affected at dissolution and that suits by or against the corporation are not affected in any way.” *Burke v. Hill*, 190 Wn.App. 897 (Wash. App. Div. 1 2015) at 911.

Therefore, RCW 23B.14.340 does not apply to time bar an action by a shareholder to enforce RCW 23B.14.300 by liquidation and winding up of a corporation’s affairs and distribution of assets to shareholders after an administrative dissolution, because the shareholders remain owners of the stock, with all rights to distribution until winding up and distribution actually happens, even if three years, ten years, or twenty years pass – the stock holders still own their stock until wind up and distribution of corporation assets is completed. There is no other legal mechanism for transfer of title of corporate assets to creditors or shareholders.

A corporation’s assets continue to be owned and managed by the corporation after administrative dissolution, through the process of winding up the corporation’s affairs and distribution of the net assets to the shareholders, however long that takes, and presumably through the period of litigation and resolution of any claims against the corporation that are filed within the three year survival period after the administrative dissolution.

E. **CONCLUSION**

The trial court erred in granting Defendant's Motion to Dismiss Plaintiffs' claims. RCW 23B.14.340 does not apply to shareholder actions to enforce shareholder rights to judicial dissolution, accounting, winding up, pursuit of derivative actions, and liquidation and distribution of net corporate assets. The Order should be reversed, and the case remanded for further proceedings on the pleadings.

May 12, 2017

Respectfully submitted,



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