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Corporations: Proceeding Against a Dissolved Corporation

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CORPORATIONS: PROCEEDING AGAINST A DISSOLVED CORPORATION

Neville v. Leamington Hotel Corp., 47 So.2d 8 (Fla. 1950)

In December 1946 plaintiff brought a common law action against defendant in its corporate name to recover a real estate brokerage commission. Defendant, which was solvent, had been voluntarily dissolved in November, 1945, but its existence had been continued, pursuant to statute,[1] for a period of three years for the sole purpose of winding up its affairs, including prosecuting and defending suits. The lower court granted a motion to dismiss, whereupon plaintiff unsuccessfully moved to substitute the trustees and directors of the corporation as defendants. On certiorari, HELD, the trustees of a dissolved corporation may be sued, even though the proceeding is not pending at disolution. Judgment reversed, Justice Thomas dissenting.

This case involves three closely related problems: first, the amenability of a corporation to suit after dissolution; second, the applicable statutory provisions; and third, the party to be named as defendant. The first of these, which requires somewhat fuller treatment, is discussed last.

Under Section 612.50 of *Florida Statutes 1949* the circuit court, sitting in chancery, may upon the application of any creditor or stockholder of the corporation continue its directors as trustees, or alternatively appoint a receiver, for the purpose of winding up its affairs. For such purpose their powers may be continued for as long as the chancellor deems necessary. In the instant case the Court rejected the application of this provision, for the reason that its whole tenor indicates that it should be limited to corporations in a precarious condition. Only when the exigencies of the situation, such as insolvency, actual fraud, or mismanagement amounting to fraud,[2] demand is the appointment of a receiver proper.

The sections applicable to a solvent corporation able to liquidate its affairs are 612.47, which continues the corporate life for three years for orderly settling of affairs; 612.48, which automatically renders the directors trustees for this purpose; and 612.49,[3] which

[1]FLA. STAT. §612.47 (1949).

[2]McAllister Hotel, Inc. v. Schatzberg, 40 So.2d 201 (Fla. 1949).

[3]"The persons constituted trustees . . . may sue for and recover the debts and property, by the name of the trustees of such corporation, describing it by its

authorizes suit by and against the trustees in their name as such trustees.[4]

This last provision gives the answer to the third problem posed, namely, the party to be sued. In this connection Section 612.53 is pertinent by analogy. It proscribes abatement of an action pending at dissolution, and provides for the filing of a suggestion of dissolution. Service of notice thereof should be made upon the trustees or receivers, or, when service on them is impracticable, upon counsel of record, whereupon ". . . said action shall proceed to final judgment against the said trustees or receivers by the name of the corporation." Under the corresponding provisions governing banks and similar corporations, a suit against the trustees has been held proper.[5] Although New York has interpreted its similar statute[6] as requiring suit against the corporation itself,[7] other states construe their corresponding statutes[8] to prescribe a caption naming certain individuals as trustees of the corporation involved.[9]

In the instant case the Florida Supreme Court directed reinstatement of a common law action commenced after the dissolution of the defendant corporation. Furthermore, interlocutory certiorari, which applies in equity only,[10] was granted. The strong indication is that such a proceeding should be brought in equity, and that in any event the trustees should be named as defendants, while an action or suit pending at dissolution should proceed in the manner specified in Section 612.53.

Turning now to the first problem, it is well settled that after dissolution of a corporation a party may proceed against it in accordance with the statutes extending its life.[11] At common law a pending

corporate name, and shall be suable by the same name for the debts owing by such corporation at the time of its dissolution. . . ."

[4]See generally FLA. STAT. §§611.31, 611.32, 611.34 (corresponding provisions for banks, insurance companies, etc.); 610.16-610.18 (continuance after dissolution for failure to pay taxes or file reports).

[5]Megdall v. Scott Corp., 40 So.2d 139 (Fla. 1949).

[6]N.Y. GEN. CORP. LAW §29 (1940).

[7]O'Neil v. American Radiator Co., 43 F. Supp. 543 (S.D.N.Y. 1942); Cunningham v. Glauber, 133 App. Div. 10, 117 N.Y. Supp. 866 (1st Dep't 1909).

[8]*E.g.*, ALA. CODE ANN. tit. 10, §110 (1940); ORE. COMP. LAWS ANN. §77-259 (1939).

[9]48th Street Inv. Co. v. Fairfield-American Nat. Bank, 223 Ala. 44, 134 So. 803 (1931); Black v. Sullivan Timber Co., 147 Ala. 327, 40 So. 667 (1906); Dundee Mtge. & Trust Inv. Co. v. Hughes, 77 Fed. 855 (D. Ore. 1896).

[10]R. PRAC. SUP. CT. FLA. 34.

[11]See 16 FLETCHER, CORPORATIONS §8143 (rev. ed. 1942).

action abated upon dissolution.[12] Delaware, by express statutory provision,[13] requires the corporation to sue or be sued in its corporate name until the end of the three-year period, at which time the names of the trustees are substituted for the purpose of completing suit. While Florida provides by statute[14] that an action already pending will not abate by reason of dissolution, provided the names of the trustees or receivers are entered upon the record, the concluding clause of Section 612.50 is the only statutory language indicating that a suit still pending at the expiration of the three-year extension period may be prosecuted to judgment; and even this is not free from ambiguity. It is noteworthy, therefore, that in the instant case, in which the action was commenced after dissolution and was still pending after three years, the Court sanctioned continuation of the cause. It did so, however, with the sound caveat that the parties must "move promptly."[15]

SOL H. PROCTOR

DIVORCE: FLORIDA ALIMONY SUIT AFTER VALID EX PARTE FOREIGN DIVORCE

Pawley v. Pawley, 46 So.2d 464 (Fla. 1950)[1]

Respondent husband secured a Cuban divorce predicated on constructive desertion, a ground sufficient under both Cuban and Florida law. His wife did not appear, and the issue of alimony was not raised. Subsequently he remarried. Thereafter his first wife sued him in Florida for alimony unconnected with causes of divorce.[2]

[12] *In re* Booth's Drug Store, Inc., 19 F. Supp. 95 (W.D. Va. 1937); Trower v. Stonebraker-Zea Livestock Co., 17 F. Supp. 687 (1937); *Ex parte* Davis, 230 Ala. 668, 162 So. 306 (1935); see 16 FLETCHER, CORPORATIONS §8143 (*Rev. ed.* 1942).

[13] DEL. REV. CODE §2078 (1935), Atkins v. W. A. Harriman & Co., 69 F.2d 66 (2d Cir. 1934).

[14] FLA. STAT. §612.53 (1949).

[15] At p. 9.

[1] On rehearing, Chapman, J., dissented, but not on the substantive point involved; his position was that the bill should not be dismissed and that complainant wife should be allowed to amend it. Application for certiorari was denied, 71 Sup. Ct. 90 (1950).

[2] FLA. STAT. §65.10 (1949): "If any husband having ability to maintain or