Michigan Law Review

Volume 51 | Issue 8

1953

CORPORATIONS-APPOINTMENT OF RECEIVER SOLELY FOR THE PURPOSE OF BRINGING SUIT

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CORPORATIONS—APPOINTMENT OF RECEIVER SOLELY FOR THE PURPOSE OF BRINGING SUIT—An ex parte petition was filed by a minority stockholder of a foreign corporation requesting the appointment of a special receiver for certain claims of the corporation against resident fiduciaries. The claims, which had not been prosecuted by the corporation, were about to be barred by the statute of limitations. A receiver was appointed and brought suit. The corporation appeared specially requesting that the order be set aside. *Held*, motion denied. A court of equity has inherent power to appoint a receiver for the assets of a foreign corporation in an ex parte proceeding instituted by a minority stockholder. *Application of Burge*, (N.Y. 1952) 118 N.Y.S. (2d) 23.

Where adequate grounds are stated[1] and the petitioner has sufficient interest in the property,[2] a court of equity has inherent power to appoint a receiver for local assets of a foreign corporation.[3] A clear distinction is drawn between appointment of a receiver for the assets and for the corporation with the latter situation usually resulting in a denial due to the inability of the court to enforce its decrees.[4] Appointment of a receiver is a remedy rather than a right and is therefore discretionary.[5] Lack of an adequate remedy at law is required[6] and since receivership is considered harsh and extreme, courts are reluctant to grant it unless absolutely necessary.[7] As a general rule it must be ancillary to other relief, but there is some authority for the proposition that receivership may be an independent remedy.[8] Further, it is required that the appointment be made

[1] An exhaustive list appears in 45 AM. JUR., Receivers §49 et seq. (1943). Typical grounds are fraud, mismanagement and interference with stockholder's rights.

[2] It must be shown that there is a clear legal right, or a lien or that it constitutes a special fund from which to satisfy his claim. Golden Valley Land and Cattle Co. v. Johnstone, 21 N.D. 101, 128 N.W. 691 (1910). Stockholders and creditors have sufficient interest, Ganzer v. Rosenfeld, 153 Wis. 442, 141 N.W. 121 (1913); Mitchell v. Banco de Londres y Mexico, 192 App. Div. 720, 183 N.Y.S. 446 (1920), but it may be required that the creditor carry his claim to judgment, Shapiro v. Wilgus, 287 U.S. 348, 53 S.Ct. 142 (1932). Clearly a stockholder may seek this remedy to prevent waste. McHarg v. Commonwealth Finance Corporation, 195 App. Div. 862, 187 N.Y.S. 540 (1921).

[3] Application of Burge, 112 N.Y.S. (2d) 906 (1952); Rodgers v. Carson Lake Road Imp. Dist. No. 6, 191 Ark. 112, 85 S.W. (2d) 716 (1935).

[4] Mitchell v. Banco de Londres y Mexico, note 2 supra; 8 FLETCHER, CYC. CORP. §5833 (1919).

[5] Orth v. Transit Inv. Corp., (3d Cir. 1942) 132 F. (2d) 938.

[6] Ex parte Goodwyn, 227 Ala. 173, 149 S. 216 (1933). See also Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co., (D.C. Pa. 1905) 136 F. 710, where the court stated that the mere fact of a remedy at law was insufficient to defeat jurisdiction; it must be prompt, complete and efficient.

[7] Feess v. Mechanics State Bank, 84 Kan. 828, 115 P. 563 (1911); Hawkins v. Aldridge, 211 Ind. 332, 7 N.E. (2d) 34 (1937).

[8] Feldman v. Pennroad Corp., (D.C. Del. 1945) 60 F. Supp. 716; Kelleam v. Maryland Casualty Co. of Baltimore, 312 U.S. 377, 61 S.Ct. 595 (1941). But see Woods v. Consolidated Newspapers, 275 Ky. 479, 122 S.W. (2d) 112 (1938); Yount v. Fagin, (Tex.

in a cause then pending,[9] but in certain extreme cases appointment may be made in an ex parte proceeding.[10] The main limitation on appointment is that the court of the forum may not interfere with the internal affairs of a foreign corporation. Whether this is based on a policy of non-interference with foreign created rights or on the theory that the court will not act when its decrees are unenforceable is not clear;[11] but it is clear that courts will refuse to appoint a receiver where it is found that internal affairs are involved.[12] Some exceptions have been made where all of the interested parties are before the court and where an enforceable decree can be rendered.[13] Majority or minority stockholders or creditors are competent to petition for appointment provided the directors have been approached and have refused to act or it has been shown that such action would be useless.[14]

In the principal case, the petitioner, a minority stockholder, was a proper party and internal affairs were not involved. Moreover, the probable loss of causes of action against certain fiduciaries of the corporation for breach of their duties was an adequate ground, and a request to the directors was unnecessary due to the fact that the corporation was seeking to have the order of appointment set aside. A remedy at law was unavailable because the corporation was not subject to service of process and there was an extreme need since the statute of limitations was about to run on the claims. The case is unique in that the appointment was made in an ex parte proceeding independent of other relief. An overwhelming majority of jurisdictions would undoubtedly refuse to grant this relief on these facts;[15] nevertheless, it is a useful and effective means of preserving local assets of a foreign corporation and of forcing wayward fiduciaries within the jurisdiction to account.[16] Where other remedies are unavailable and where the corporation is not subject to service of process, it would be ridiculous to require that the receivership be ancillary or to require a preliminary hearing. The corporation is adequately protected in that it may appear

Civ. App. 1922) 244 S.W. 1036; and the principal case where receivers were appointed independent of other relief.

[9] Ex parte Goodwyn, note 6 supra; Laumeier v. Sun-Ray Products Co., 330 Mo. 542, 50 S.W. (2d) 640 (1932); 23 R.C.L. 12 et seq. (1919).

[10] Wakenva Coal Co. v. Johnson, 234 Ky. 558, 28 S.W. (2d) 737 (1930); Hawkins v. Aldridge, note 7 supra; Application of Burge, note 3 supra.

[11] Appleton v. Worne Plastics Corp., 140 N.J. Eq. 324, 54 A. (2d) 612 (1947); Langfelder v. Universal Laboratories, 293 N.Y. 200, 56 N.E. (2d) 550 (1944); 18 A.L.R. 1386 et seq. (1922).

[12] Hopkins v. Great Western Fuse Co., 343 Pa. 438, 22 A. (2d) 717 (1941); 18 A.L.R. 1383 (1922).

[13] Saltz v. Saltz Bros., (D.C. Cir. 1936) 84 F. (2d) 246, cert. den., Saltz Bros. v. Saltz, 299 U.S. 567, 57 S.Ct. 31 (1936). All the business of the corporation was done in the District of Columbia and all the parties were before the court. See also Appleton v. Worne Plastics Corp., note 11 supra; Babcock v. Farwell, 245 Ill. 14, 91 N.E. 683 (1910).

[14] Application of Burge, note 3 supra.

[15] Laumeier v. Sun-Ray Products Co., note 9 supra; Feldman v. Pennroad Corp., note 8 supra; Kelleam v. Maryland Casualty Co. of Baltimore, note 8 supra; 23 R.C.L. 11-12 (1919).

[16] Ganzer v. Rosenfeld, note 2 supra.

specially in subsequent proceedings and contest the order. When it is considered that receivership will deprive the corporation of its title or at least of its dominion over the property, there is an indication that the liberal view of the New York court should be confined to the most extreme cases, of which the principal case is a good example. If these requirements are complied with and the court is competent to render an enforceable decree, there is no apparent objection to the use of this device and, in fact, it will allow the court of equity to make good its boast of a remedy for every right.

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