

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

F.P. WOLL & CO.

CIVIL ACTION

v.

FIFTH AND MITCHELL STREET
CORPORATION, et al.

NO. 96-CV-5973

MEMORANDUM AND ORDER

McLaughlin, J.

December 13, 2001

The plaintiff in this case, F.P. Woll & Company ("Woll"), has reached a settlement with the corporate secretary and treasurer of one of the defendants, Eaton Laboratories, Incorporated ("Eaton"). On the basis of this settlement, Woll has moved for entry of judgment against both the officer and Eaton. Because I find that the settlement is invalid, I will deny the plaintiff's motion.

Eaton challenges the settlement on three grounds. First, it argues that the settlement is invalid because the defendant Eaton, which was liquidated in a Chapter 7 bankruptcy proceeding, is "defunct" and lacks the capacity to sue or be sued. Second, it argues that the settlement is invalid because Harold Bixler, the former secretary and treasurer of Eaton, lacked the authority to enter into a settlement on behalf of the company. Finally,

Eaton argues that even if Mr. Bixler did have authority to settle, it was improper for the plaintiff to have contact with him in the absence of counsel for Eaton.

I find that although Eaton retains the capacity to sue and be sued, because it was never dissolved under Pennsylvania law, Mr. Bixler as secretary and treasurer did not have the authority to act on behalf of the corporation in settlement negotiations. In addition, even if Mr. Bixler did have authority, the settlement would be void because of the conflict between Eaton's and Mr. Bixler's interests in this case.

I. Facts

In September of 1981, the plaintiff, Woll, bought a parcel of land located in Lansdale, Pennsylvania. In 1993, Woll was notified by the Pennsylvania Department of Environmental Resources and by the Environmental Protection Agency that the land was contaminated. On August 29, 1996, Woll filed this lawsuit, against, among others, defendant Eaton, asserting claims under federal and state environmental statutes, as well as common law claims. Included as defendants were "John Does 1-100," who were described as "adult individuals who owned and/or occupied portions of the real property at issue in this litigation." Second Amended Compl. at ¶ 10. Harold Bixler, who in addition to

being an officer, director and shareholder of Eaton is also the former plant manager, was not named as a defendant.

Eaton, a spin-off of defendant Jetronic Industries, was incorporated in the Commonwealth of Pennsylvania by the filing of a Certificate of Incorporation on January 19, 1978. Eaton occupied the parcel of land in Lansdale from the time of its incorporation until it ceased operations in 1985; it used the site for, among other things, the manufacture and distribution of laundry and dry-cleaning compounds. On December 12, 1985, Eaton filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Eaton's assets were liquidated and the bankruptcy proceeding was closed on March 28, 1989. Eaton was never dissolved under Pennsylvania law.

Because Eaton ceased operations after it was liquidated in bankruptcy, the plaintiff was unable to serve the corporation by normal means and was forced to move for substituted service. On March 27, 1998, the Honorable Thomas N. O'Neill, Jr., granted the plaintiff's motion to serve Eaton by serving its insurance carriers, including The Home Insurance Company ("The Home"). The Home hired the law firm of Kent & McBride, P.C., to defend Eaton in this case.

In January of 2000, Woll communicated to Eaton its intention

"to seek satisfaction of any judgment against Eaton through the personal assets of Eaton's officers." Defendant's Opposition to Plaintiff's Motion for Leave to Amend the Second Amended Complaint, Document No. 205 at 4-5. On January 28, 2000, Eaton informed Harold Bixler, by letter, of Woll's intentions. Although he was not named as a defendant, Mr. Bixler retained Joseph A. Ciccitto, of the law firm Keenan, Ciccitto, & Brant, to represent him in his individual capacity in this lawsuit.

Plaintiff Woll proceeded to negotiate a settlement, through Mr. Ciccitto, with Mr. Bixler, in his individual capacity, and, purportedly, in his capacity as "the remaining officer, shareholder and director" of Eaton. Memorandum of Law in opposition to Eaton Laboratories, Inc.'s Answer to Plaintiff's Garnishment Motion, Document No. 194 at 14. On April 11, 2000, Mr. Bixler executed a Settlement Agreement and Stipulated Judgment, on behalf of himself and Eaton, in which he agreed to the entry of judgment against himself and Eaton in the amount of \$2 million. According to the defendant, neither the plaintiff nor Mr. Bixler informed Eaton's counsel of record, Kent & McBride, of the fact that Mr. Bixler was acting on Eaton's behalf. In fact, Kent & McBride claims that it did not learn of the settlement until three months after the fact, and then only

fortuitously.

Under the terms of the settlement, Eaton's claims against its insurers are assigned to the plaintiff. The settlement agreement provides that the plaintiff will hold Eaton and Mr. Bixler "harmless from any claim against them related to the averments stated in the Complaint" and that the \$2 million judgment is to be satisfied by insurance assets only. The plaintiff now seeks the entry of a stipulated judgment against both Eaton and Mr. Bixler on the basis of the settlement agreement.

11. Eaton Has Capacity To Sue

When a corporation files for bankruptcy under Chapter 7 of the Bankruptcy Code, a trustee is appointed who arranges for the orderly distribution of the corporation's assets amongst its creditors. See 11 U.S.C. § 704 (2001). The corporation is thereby liquidated. Eaton argues that judgment should not be entered against it in this case because a corporation which has been liquidated under Chapter 7 is de facto dissolved, and therefore lacks the capacity to sue and be sued.

The question of Eaton's capacity to sue and be sued after liquidation is decided under Pennsylvania law. See FED. R. CIV.

P. 17(b) (providing that "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."); 6 Lawrence P. King, Collier On Bankruptcy ¶ 727.01[3] (15th Ed. 2001) ("After liquidation, any dissolution of the corporation...must be effectuated under state law, since the Code does not provide for dissolution of corporations[.]") Pennsylvania has a 'detailed statutory scheme for voluntary corporate dissolution. In particular, Articles of Dissolution must be filed with the Department of State." Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1282 (E.D. Pa. 1994) (citations omitted). A corporation is not protected from suit until two years after the date of its dissolution. See 15 Pa.C.S.A. § 1979(a)(2) (2001). Because Eaton has not dissolved itself under Pennsylvania law, it retains the capacity to sue and be sued.

The legislative history of Section 727(a)(1) of the Bankruptcy Code - which provides that, unlike an individual, a corporation that files under Chapter 7 is not entitled to a discharge of its debts - supports the conclusion that a corporation which has been liquidated in a bankruptcy proceeding is not thereby dissolved. See 11 U.S.C. § 727(a)(1) (2001). Both the House and Senate Reports state that the denial of

discharge is meant to "avoid trafficking in corporate shells, a form of bankruptcy fraud." H.R. Rep. No. 595, 95th Cong. 1st Sess. 384 (1977). See also S. Rep. No. 989, 95th Cong. 2nd Sess. 130 (1978). This is because "a corporation with a substantial tax loss but with all of its debts discharged would be an attractive vehicle to shield profits." U.S. Dismantlement Corp. v. Jeffrey M. Brown Assoc., Inc., 97-CV-1309, 2000 WL 433971, at *2 (E.D. Pa. Apr. 13, 2000). There would be no traffic in corporate shells if those shells were de facto dissolved, and therefore lacked the capacity to act. The shell of a bankrupt corporation would only be attractive if it were still alive, and able to resume business free of its obligations. This is likely why Congress acted affirmatively, as part of the Bankruptcy Reform Act of 1978, to deny discharge to corporations.

The relevant case law also supports the conclusion that "defunct" corporations are not dissolved and therefore retain the capacity to sue and be sued. See Nat'l Labor Relations Bd. v. Better Bldg. Supply Corp., 837 F.2d 377, 379 (9th Cir. 1988) (corporate debt could be charged against liquidated corporation when it resumed operations); Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 103 F.Supp.2d 1180, 1183-1184 (N.D. Cal. 2000) (corporation's bankruptcy did not bar suit); DeLeon v.

Beneficial Constr. Co., 55 F.Supp.2d 819, 824 (N.D. Ill.

1999) (plaintiff could sue corporation as soon as its bankruptcy case was closed, despite fact that corporation was "insolvent and certainly judgment-proof"); In re CVA General Contractors, Inc., 267 B.R. 773, 782 n.10 (Bankr. W.D. Tx. 2001) (liquidation did not effect dissolution). But see, e.g., U.S. Dismantlement v. Jeffrey M. Brown Assoc., Inc., 97-CV-1309, 2000 WL 433971, at *4 (E.D. Pa. Apr. 13, 2000). In Better Building Supply Corporation, the Ninth Circuit rejected the argument raised by Eaton in this case that Congress denied discharge to corporations because discharge would be pointless, since Chapter 7 proceedings effect dissolution. See Better Bldg. Supply Corp., 837 F.2d at 379. Instead, that court found, corporations are denied discharge to prevent them from resuming business free of debt. Id. The debt survives bankruptcy, and the corporation survives too, because the debt cannot survive without a debtor.

III. Mr. Bixler Lacked Authority To Settle on Eaton's Behalf

A corporation cannot act on its own behalf; it is a "legal fiction" which can only act through its officers, directors or other agents. Biller v. Ziegler, 593 A.2d 436, 439 (Pa. Super. 1991). **A corporation is legally bound by the actions of one of its agents, as long as those actions are within the scope of that**

agent's authority. Authority can be "(1) express authority, or that which is directly granted; (2) implied authority, to do all that is proper, usual and necessary to the exercise of the authority actually granted; (3) apparent authority, as where the principal holds one out as agent by words or conduct, and (4) agency by estoppel." Apex Fin. Corp. v. Decker, 369 A.2d 483, 485 (Pa. Super. 1936). The burden of proof rests with the party attempting to establish an agency relationship - in this case, the plaintiff, Woll. See Gillian v. Consol. Foods Corp., 227 A.2d 858, 861 (Pa. 1967); Apex Fin. Corp. v. Decker, 369 A.2d at 485.

Mr. Bixler lacked the actual or implied authority to settle this case on behalf of Eaton. The power to make decisions regarding litigation rests with a corporation's board of directors. See Cuker v. Mikalauskas, 692 A.2d 1042, 1048 (Pa. 1997) ("Decisions regarding litigation by or on behalf of a corporation...are business decisions as much as any other financial decisions. As such they are within the province of the board of directors."). Individual members of the board of directors, however, only have such actual authority as is given them in the corporation's by-laws.¹ See 15 Pa.C.S.A. § 1732(b)

¹ This is true even if, as plaintiff argues, "Mr. Bixler is the last remaining officer, director, guarantor and stockholder of Eaton." Plaintiff's Motion for Entry of Judgment, for

(continued...)

(2001). The plaintiff has not produced Eaton's by-laws and Eaton represents that they no longer exist.

"The secretary of a corporation has no inherent power 'to bind the corporation by letters or documents officially signed by him.'" Constructors' Ass'n of Western Pennsylvania v. Furman, 87 A.2d 801, 803 (Pa. Super. 1952) (finding first that a secretary who was an officer lacked authority before going on to find that the secretary in the case was actually only an employee). In Constructors' Ass'n of Western Pennsylvania, the issue was whether the statement of the secretary of the corporation was admissible in evidence as a statement against the interest of the corporation. The court held that the statement was not admissible "[i]n the absence of proof that {the secretary} possessed authority to bind the corporation by such admission." Id.

An agent has the implied authority to do what is usual or ordinary in carrying out his or her responsibilities. See Renault v. L.N. Renault & Sons, Inc., 188 F.3d 317, 319-320 (3d Cir. 1951); Apex Fin. Corp. v. Decker, 369 A.2d at 485. The plaintiff has not alleged that Mr. Bixler usually or ordinarily needed to reach settlement on behalf of Eaton in lawsuits the

¹(...continued)
Garnishment and for Issuance of a Writ of Execution, Document No. 176 at 2.

magnitude of this one in order to fulfill his duties as corporate secretary and treasurer. Even the president of the company would likely lack such implied authority because a settlement like this is not an ordinary, run-of-the-mill transaction for a company like Eaton, which has gone through bankruptcy and has no assets. See, e.g., Kelly, Murray, Inc. v. Landsdowne Bank & Trust Co., 149 A. 190, 192 (Pa. 1930) (president lacked authority because sale of \$250,000 worth of real estate was not run-of-the-mill transaction for bank which had capitalization of \$375,000); Rizzi v. American Russian Political & Beneficial Club, 186 A.2d 440, 442 (Pa. Super. 1962) (erection of building was not routine transaction and president of corporation therefore lacked the authority to bind the corporation to a contract for payment of the balance due for the erection of a building, or to give direction to the building contractor regarding completion of the building).

In addition to lacking actual or implied authority to settle this lawsuit on behalf of Eaton, Mr. Bixler also lacked apparent authority to bind the corporation. Apparent authority is determined with reference to the actions of the principal. **It is** "that authority which, although not actually granted, the principal knowingly permits the agent to exercise, or holds him out as possessing." D&G Equip. Co. v. First Nat'l Bank, 764,

F.2d 950, 954 (3d Cir. 1985). "Apparent authority can exist only to the extent that it is reasonable for the third party dealing with the agent to believe the agent is authorized." Id. Woll has not pointed to any actions taken by Eaton which would support a finding that Mr. Bixler had apparent authority to settle this case.' The mere fact that Mr. Bixler held a corporate office is insufficient to establish apparent authority to act, at least with regards to an extraordinary transaction. See Jenninss v. Pittsburgh Mercantile Co., 202 A.2d 51, 54 (Pa. 1964). As the Pennsylvania Supreme Court explained in Jenninss: "[A]ny other conclusion would improperly extend the usual scope of authority which attached to the holding of various corporate offices, and would greatly undercut the proper role of the board of directors in corporate decision-making by thrusting upon them determinations on critical matters which they have never had the opportunity to consider." Id. (citations omitted).

IV. Rule 4.2 Violation

Eaton's final argument is that the settlement should not be honored because plaintiff's counsel violated Rule 4.2 of the Pennsylvania Rules of Professional Conduct by communicating with

² Woll has also failed to point to any facts which would support a finding that Eaton is estopped from challenging Mr. Bixler's authority to settle.

Mr. Bixler without obtaining the consent of counsel for Eaton. Rule 4.2 provides that: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." However, the Comment to the Rule states that: "If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule."

There may have been no technical violation of Rule 4.2 here, because counsel for the plaintiff negotiated this settlement with Mr. Bixler's personal counsel. The settlement, however, is called into question by the conflict of interest between Mr. Bixler and Eaton. A corporation is not bound by the acts of its agent if the agent "acted for his own benefit without the corporation's ratification of his actions." National Risk Mgmt., Inc. v. Bramwell, 819 F. Supp. 417, 434 (E.D. Pa. 1993). Even if Mr. Bixler did have authority, then, the settlement would be invalid, because he appears to have acted for his own benefit and without the ratification of Eaton in settling this case.

An Order follows.

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No. 9€-5973

ORDER

AND NOW, this 13th day of December, upon consideration of the plaintiff's Motion for Entry of Judgment, For Garnishment, and for Issuance of a Writ of Execution (Docket #176) and all responses and replies thereto, and after oral argument, it is hereby **ORDERED** and **DECREED** that the plaintiff's motion is **DENIED** as to Eaton Laboratories, Incorporated and as to Harold Bixler for the reasons stated in a memorandum of today's date.

BY THE COURT:



Mary A. McLaughlin, J