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Corporations—Action by Former Director Against Fellow Directors

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ACTION BY FORMER DIRECTOR AGAINST FELLOW DIRECTORS

New York General Corporation Law Sections 60 and 61 authorize a corporate director to bring an action against his fellow directors to compel performance of their fiduciary duties and recover for losses occasioned by the breach thereof. The principal questions in *Tenny v. Rosenthal*[20] were whether an action brought under these sections abated when the plaintiff director ceased to be a director, and whether he has lost his status to maintain the suit after he was not re-elected.

Five months after the commencement of this action, concerned with *ultra vires* investments and excessive compensation paid to the directors, the plaintiff was not re-elected to his position on the Board. This was a result of the defendants' reducing the Board from eight to five members, and not placing plaintiff on the proposed slate of Directors. Defendants' contentions in their motion for dismissal were that the action had abated[21] and that the plaintiff no longer had legal capacity to sue.

The Court held in a unanimous decision that plaintiff, although no longer a director, could maintain this action and that it did not abate.

"A cause of action does not abate by any event if the cause of action survives or continues."[22] It is recognized that a plaintiff director is not suing in his own behalf but on behalf of the corporation. For this reason the cause of action exists for the corporation and survives whether or not the plaintiff is still a director.[23] On the basis of this reasoning a series of cases have held that an ex-director could continue prosecution of a suit.[24] In *Wangrow v. Wangrow*[25] the defendants had attempted to render the plaintiff director's stock worthless by causing the corporation to cease functioning. In *Manix v. Fantl*,[26] the defendant directors were investing in stocks although the corporation was not empowered to do so (the same problem as in the instant case). Both of these cases held that to allow the action to abate would render Sections 60 and 61 practically ineffectual in accomplishing their intended purposes.

The holding that the action does not abate under these circumstances leaves open the question of plaintiff's standing to sue. The Court distinguished the present case from a stockholders' derivative suit, an analogy suggested by defendants, so as to avoid the effect of a series of holdings that when a plaintiff stockholder sells his stock he loses his right to continue a derivative suit.[27] The two types of representative actions have been held to be in such different

20. 6 N.Y.2d 204, 189 N.Y.S.2d 158 (1959).
21. N.Y. CIV. PRAC. ACT § 82.
22. *Ibid.*
23. Manix v. Fantl, 209 App. Div. 756, 205 N.Y. Supp. 174 (1st Dep't 1924); Wangrow v. Wangrow, 211 App. Div. 552, 207 N.Y. Supp. 132 (1st Dep't 1924); Abberger v. Kulp, 156 Misc. 210, 281 N.Y. Supp. 373 (Sup. Ct. 1935).
24. *Ibid.*
25. Wangrow v. Wangrow, *supra* note 23.
26. Manix v. Fantl, *supra* note 23.
27. Gleicher v. Times-Columbia Distributors, Inc., 283 App. Div. 709, 128 N.Y.S.2d 55 (1st Dep't 1954); Smith v. Industrial Acceptance Corp., 265 App. Div. 931, 38 N.Y.S.2d 379 (1st Dep't 1942).

capacities, *i.e.* as a stockholder to protect personal rights, and as a director to perform his fiduciary duty to the corporation, that a single party has even been allowed to maintain both actions simultaneously.[28] This analogy is inapplicable for another reason as it relates to the instant case. A stockholder who sells his stock, has by his own volition given up his connection with the corporation and the suit. However, the director in this case had his relationship with the corporation terminated by the actions of the defendants and contrary to his own wishes. A further distinction between the two representative suits is that a director is required to bring a suit such as this in fulfillment of his statutory and common law duties as a "trustee" while stockholders are under no such duties.[29]

The Court analogized representation by a director to that of a *guardian ad litem*,[30] and indicated that he could be replaced when his "ward" became capable of representing itself.[31] The corporation "ward," was not capable of protecting itself in the instant case because the very persons against whom the suit was brought were those in control of the corporation.

The purpose of these sections[32] is to enable a director to vindicate wrongs against the corporation by those in control of it. In order to effectuate this policy it is best that a director, although no longer in office, be allowed to direct the litigation unless and until there is a party better qualified to do so.

VALUATION OF STOCK OF MINORITY STOCKHOLDERS

Soll Roehner was a minority stockholder of respondent corporation, which was organized in 1954.[33] In 1955, the corporation constructed a multiple dwelling, the management and operation of which was the sole business activity of respondent. In the latter part of 1957, petitioner agreed, along with the other principal stockholders, to a sale of this one real estate asset, pursuant to a plan of dissolution. The sale was actually consummated on May 1, 1958, but without the knowledge of petitioner, as no meeting of stockholders was held. After the sale, respondent corporation decided against dissolution and attempted to keep the corporation a going concern. Thereafter, petitioner commenced this proceeding to have the value of his stock determined in accordance with Section 21 of the Stock Corporation Law,[34] claiming a violation of Sections 20 and 45 of the same law.[35] The Supreme Court,

28. Loewenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N.Y. Supp. 313 (1st Dep't 1904).

29. Williams v. Robinson, 9 Misc. 2d 774, 169 N.Y.S.2d 811, *aff'd* 5 A.D.2d 823, 170 N.Y.S.2d 991 (1st Dep't 1958).

30. While one may agree with the analogy drawn by the Court on this point, the authority which it relies on does not appear applicable in that all of the cases so cited were concerned with stockholders derivative suits which the Court itself distinguished from those involving a suit brought by a director.

31. Ream v. Ream, 281 N.Y. 395, 24 N.E.2d 96 (1939).

32. N.Y. GEN. CORP. LAW §§ 60, 61.

33. Roehner v. Gracie Manor Inc., 6 N.Y.2d 280, 189 N.Y.S.2d 644 (1959).

34. Section 21 N.Y. STOCK CORP. LAW provides for the conditions and provisions by which stockholder may have his stock appraised and paid for by the corporation.

35. Section 20 N.Y. STOCK CORP. LAW requires the consent of two-thirds of the stock-