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Corporations—Stockholders' Derivative Actions

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opinions suggest the inability of the parties to establish conclusively the motivating factors behind defendant's acts.

Suit against Stockholder by Creditor of Corporation — Per Curiam

The stockholder of a corporation told the president orally that if the corporation would engage in an advertising campaign, he would personally reimburse it. The Court dismissed this action by the advertising agency inasmuch as the agency was "at best an incidental beneficiary rather than a third-party creditor beneficiary."[14] However, the defendant's defense of the Statute of Frauds was rejected since the promise was not made to the plaintiff but to a third person.[15]

Contracts in Restraint of Trade — Per Curiam

In *Paramount Pad Co. v. Baumrind*,[16] the Court, in a per curiam opinion, held that a contract with a former employee which not only prohibited him from soliciting or divulging the names of plaintiff's customers, but also required him to obtain plaintiff's written permission before accepting any position in the shoulder pad industry, imposed an unreasonable restraint, going beyond plaintiff's legitimate interests. Therefore, the contract was void[17] and an action was properly dismissed which was based upon its breach and inducement of its breach.

CORPORATIONS

Stockholders' Derivative Actions

In *Tropper v. Bysshe*[1] the appellant, who owned less than two-tenths of one per cent of the stock of the Camden Forge Company,[2] brought a derivative stockholder's action in its behalf, naming as defendants Camden and a parent corporation which held more than 98% of Camden's stock. An order was entered pursuant to section 61(b) of the General Corporation Law requiring appellant to post security for expenses which Camden might incur in the action.

Section 61(b) requires a stockholder bringing a derivative action to post security for reasonable expenses, including attorney's fees, which security inures

14. Tomaso, Feitner and Lane, Inc. v. Brown, 4 N.Y.2d 391, 175 N.Y.S.2d 73 (1958).
15. 2 WILLISTON, CONTRACTS §460 (1936).
16. 4 N.Y.2d 393, 175 N.Y.S.2d 809 (1958).
17. N. Y. GENERAL BUSINESS LAW §340.

1. 4 N.Y.2d 397, 175 N.Y.S.2d 811 (1958).
2. Plaintiff-appellant owned 200 shares of Camden's common stock, the total market value of which was approximately one thousand dollars.

to the benefit of the corporation,[3] where the stockholder owns less than 5% of the outstanding shares of any class of stock, unless the stockholder owns stock having a market value in excess of fifty thousand dollars. The purpose of the enactment is to prevent a small stockholder from bringing a derivative action in bad faith, incurring litigation expenses on behalf of the corporation, thereby depleting the corporate treasury and enabling the stockholder to "hold-up" the corporate for private advantage.[4] The enactment presupposes that a stockholder owning more than the statutory minimum has such an interest in the corporate pocketbook that he will not bring a derivative action in bad faith.[5]

The appellant in this case contended that the shares of the defendant parent corporation should not be counted as "outstanding shares" because the parent corporation was in fact merely Camden's "alter ego," and also contended that since the purpose of the action is to protect wronged stockholders, the shares of a wrongdoing stockholder who is named a defendant should be excluded for the purposes of a derivative action, especially where the defendant has allegedly benefited by the act challenged by litigation.

The Court rejected these arguments, upholding the corporate distinction between Camden and the parent corporation and taking the view that a derivative action is brought on behalf of the corporation and not simply on behalf of the wronged stockholders.

The appellant also contended that the Legislature intended that a small stockholder might escape the burden of section 61(b) by combining with other stockholders as plaintiffs, and that since this was impossible in this case because the defendant owned almost all the stock,[6] to enforce the statute in the absence of an option to avoid it would be an injustice never intended by the Legislature, because it would put wronged stockholders at the mercy of a wrongdoing defendant stockholder.

The Court also rejected this argument, noting that section 61(b) does not bar a derivative action but rather adds a procedural requirement. The Court, therefore, in effect, accepted the counter-argument that the corporation (Camden) is just as much in need of protection where the bulk of the stock is in the hands of an allegedly wrongdoing defendant stockholder as where it is not.

3. N. Y. GENERAL CORPORATION LAW §64.
4. Noel Associates v. Merrill, 184 Misc. 646, 655, 53 N.Y.S.2d 143, 152 (Sup. Ct. 1944).
5. Dalva v. Bailey, 158 F. Supp. 204, 206 (S.D.N.Y. 1957).
6. Defendant-respondent stockholder owned all but 1.85% of the stock, the market value of which was well below the minimum statutory requirement of fifty thousand dollars.