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Business Associations—Fiduciary Duty of Employees

Jules Gordon

This recent decision of the court in *Auer v. Dressel*,[26] resulted from a refusal of a corporation president to call a special stockholders' meeting as prescribed in the by-laws, on the grounds that none of the four purposes of the meeting was a proper one. The crucial purpose was that the "stockholders should hear charges preferred against four of the directors, determine whether their conduct was inimical to the corporation, and if so, to vote for their removal and vote for the election of their successors."

Without deciding the question of whether adequate hearing could be had before 1500 stockholders or their proxies, the court held that such is a proper purpose for a stockholders' meeting.

Previous New York cases have held that stockholders cannot remove directors without good cause,[27] but that if cause is shown, the stockholders have the inherent power even without specific statutory authorization to remove directors.[28] This appears to be the first New York case to hold that the stockholders retain the power although it is also given to the Board of Directors.

Van Voorhis' dissent, in which Conway concurs, argues that the directors can be removed only after full and fair trial, either under Section 60 of the General Corporation Law, or according to the by-laws, by the remaining directors. If a meeting is called for the stockholders to vote on removal, most stockholders would be represented by proxy and could vote only by prejudging the case. This would amount to the removal of directors by whim and not for good cause as the law requires.

The court's answer to this is that the fairness of the proceedings is not now before it, and if any director is illegally removed, he has remedy in the courts.[29]

Fiduciary Duty of Employees

It is a breach of the fiduciary duty owed by the employee to the employer for the employees to act in any way inimical to the interests of the employer to serve their own interests.[30]

In *Duane Jones Co., Inc. v. Burke et al.*,[31] the Court of Appeals illustrated this principle by affirming an award of damages to an employer—advertising agency against former key employees. While still employed by the plaintiffs, the defendants made

26. 306 N. Y. 427, 118 N. E. 2d 590 (1954).
27. *People ex rel. Manice v. Powell*, 201 N. Y. 194, 94 N. E. 634 (1911).
28. In re *Koch*, 257 N. Y. 318, 321, 322, 178 N. E. 145, 146 (1931).
29. *Ibid.*
30. See *Byrne v. Barrett*, 268 N. Y. 199, 197 N. E. 217 (1935), *Lamdin v. Broadway Surface Advertising Co.*, 272 N. E. 133, 5 N. E. 2d 66 (1936).
31. 306 N. Y. 172, 117 N. E. 2d 237 (1954).

arrangements to organize a competing advertising agency and solicited clients of the plaintiff to terminate their relationship with the plaintiff and to become clients of the new agency to be formed by the defendants.

Even though the clients did not terminate their connection with the plaintiff until after the defendants had left its employ, the defendants were still held liable on the grounds that the loss to the plaintiff was caused by the action of the defendants during the existence of the fiduciary relationship.[32]

Enforcement of Arbitration Agreement

A contract between parties to arbitrate any dispute between them as to interpretation of other agreements, will be enforced under Article 84 of the Civil Practice Act only if there is a bona fide arbitrable dispute.[33]

Essenson v. Upper Queens Medical Group[34] dealt with the expulsion of a doctor by a medical group. The articles of co-partnership of the group provided for expulsion for acts adversely affecting the partnership and provided for procedure to be followed in such a case. The articles also contained a clause, "Should any controversy arise with respect to the interpretation of any of the terms of this agreement or with respect to the rights of any partner pursuant to this agreement, such controversy shall be submitted to arbitration."

Upon serious charges, and under the prescribed procedure, the doctor was expelled. He sought arbitration as an alternative to an Article 78 proceeding to overrule the expulsion.[35]

The question, if any, to be arbitrated was not whether or not the doctor should be expelled, but whether he was expelled under proper procedure.

The court held that the burden lay with the doctor to prove that improper procedure was followed. Since he did not do so, no arbitrable dispute was shown, and his petition was dismissed.

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32. See *Byrne v. Barrett, supra* note 30, and *Volk Co. v. Fleschner*, 298 N. Y. 717, 83 N. E. 2d 15 (1948).

33. *Matter of International Assn. of Machinists, Dist. No. 15, Local No. 402, Schrank*, 271 App. Div. 917, 67 N. Y. S. 2d 317 (1947). *aff'd* 297 N. Y. 519, 74 N. E. 2d 464 (1947). *General Electric Co. v. United Electric Radio and Machine Workers of America, C. I. O.*, 300 N. Y. 262, 90 N. E. 2d 181 (1949).

34. 30 N. Y. 68, 120 N. E. 2d 209 (1954).

35. C. P. A. Art. 78 provides relief as was formerly granted by way of the writs of mandamus and proscription against such actions as wrongful expulsion.