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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 740862

HENRY B. BAYLOR

Appellant

v.

BEVERLY BOOK COMPANY, INCORPORATED,
a Virginia corporation
and
THOMAS W. DIXON

Appellees

APPENDIX TO APPELLANTS' BRIEF

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IN THE

SUPREME COURT OF VIRGINIA

HENRY B. BAYLOR

Appellant

v. Record No.740862

BEVERLY BOOK COMPANY, INCORPORATED
a Virginia corporation
and
THOMAS W. DIXON

Appellees

[1] BILL OF COMPLAINT

1. That the defendant, Beverly Book Company, Incorporated, is a corporation authorized and existing under the laws of the Commonwealth of Virginia, whose principal office is located in the City of Staunton, Virginia, and whose president is the defendant, Thomas W. Dixon;

2. That hs is the owner of 100 shares of the common stock of the defendant, Beverly Book Company, Incorporated, and that Thomas W. Dixon, defendant, is the owner of 297 shares of the common stock of the defendant, Beverly Book Company, Incorporated, the said two parties being the owners of all the issued stock of said Company to the best of your complainant's belief;

3. That Thomas W. Dixon, the majority stockholder in said defendant Company, has, without director

or stockholder approval, over the past twenty or more years, made advances to himself of certain monies of the said Company, said advances being in the nature of interest-free loans, the amount owing by said defendant Dixon to said defendant Company as of December 31, 1972, being $11,321.29; and said amounts owing by said defendant Dixon at the end of each calendar year for the past twenty or so years ranging from a low of $369.80 in 1952 to a high of $25,267.27 in 1965;

4. That during the period of time that such advances were made by said defendant Dixon to himself, the defendant Company was in such financial condition that required it to borrow sums of money for operating capital at the prevailing interest rates at commercial lending institutions, the amount owed by said defendant Company on December 31, 1972, being $12,018.81;

5. That the defendant, Thomas W. Dixon, has otherwise ignored the corporate existence of the defendant, Beverly Book Company, Incorporated, by failing to hold the required stockholder and directors meetings and that he has operated said corporation largely upon his own initiative and design, without following accepted corporate procedure;

6. That the acts of the said defendant Dixon, as the majority stockholder, president and director are oppressive and that corporate assets are being misapplied

and wasted by him, all to the financial loss and detriment of the complainant;

WHEREFORE, your complainant prays that the defendant Company be liquidated in accordance with Section 13.1-94 of the Code of Virginia and that the Court appoint a receiver with authority to collect the assets of the corporation, including amounts owing to the corporation by the said defendant Dixon, together with interest thereon, and to act in accordance with Section 13.1-95 to sell, convey or dispose of all corporate assets, apply the proceeds to the expenses of such liquidation and the payment of corporate liabilities and to then disburse all remaining assets to and among its respective stockholders according to their respective rights, and that your complainant have such other relief as the nature of his case may require.

HENRY B. BAYLOR

By: /s/ D. C. Wray, Jr.
Counsel
/s/ Lewis M. Costello
Counsel

[Filed January 2, 1974]

* * *

[5] SPECIAL PLEA

NOW COME the respondents, Beverly Book Company, Incorporated, and Thomas W. Dixon and as their special plea to the complainant's bill of complaint, they say

that said bill does not allege insolvency, failure to pay creditors or anything more than acts that might normally affect the value of the complainant's stock; however, under Article V, Section 5 of the By-Laws of the Beverly Book Company, Incorporated, any stockholder, if he is to dispose of his stock, must first afford the corporation or its remaining stockholders the opportunity to purchase such stock at par value; and respondents say that the complainant Baylor owns 100 shares of the capital stock of Beverly Book Company, Incorporated, with a par value of $100 per share, and that the respondents are ready and willing and have been since the retirement of the complainant Baylor as an officer and employee of Beverly Book Company, Incorporated, to pay him the Ten Thousand Dollars ($10,000.00) for his stock holdings, the price at which he is obligated to sell. Therefore, complainant can establish no loss by virtue of these proceedings nor can he establish the right to any relief under Section 13.1-94 of the Code of Virginia.

And this the respondents are ready to verify.

BEVERLY BOOK COMPANY,
INCORPORATED
THOMAS W. DIXON

By /s/ Wayt B. Timberlake, Jr.
Counsel

[Filed January 10, 1974]

* * * *

[8] EXHIBIT

February 13, 1974

To Whom It May Concern:

This is to certify that the undersigned are and have been since the retirement of Mr. H. E. Baylor from Beverly Book Company, Inc., ready, willing and able to purchase his Capital Stock in the Beverly Book Company, Inc., at its total par value of $10,000.

BEVERLY BOOK CO., INC.

By: /s/ Thomas W. Dixon
President

/s/ Thomas W. Dixon [Filed February 27, 1974]

* * *

EXHIBIT

[9] OFFICE OF THE BEVERLY BOOK COMPANY, INC.

STAUNTON, VIRGINIA

B Y - L A W S

ARTICLE I

STOCK-HOLDERS

Section 1. The STOCK-HOLDERS of this company shall be those who appear on the books of the company as holders of one or more shares of the capital stock.

Sec. 2. The ANNUAL MEETING of the stock-holders shall be held on the 2nd Monday of June each year at the principal offices of the company, for the election of the Board of Directors for the ensuing year, and for the transaction of such other business as may properly

come before the meeting. Notice of the annual meeting shall be mailed to each stock-holder to his address as the same appears on the records of the company, at least five days prior to the meeting.

Sec. 3. A SPECIAL MEETING of the stock-holders may be held at anytime upon the call of the President, or by order of the Board of Directors, and it shall be the duty of the said President to call such a meeting whenever re-quested so to do by stock-holders holding 10% of the capital stock. Written notice of such special meeting shall be mailed to each stock-holder at his address as the same appears on the records of the company, at least five days prior to meeting, stating therein the purpose of which the meeting is held,

Sec. 4. The majority of the issued and outstanding stock of the Company must be represented in person or by proxy to constitute a quorum. Only those shall be entitled to vote who appear as stock-holders upon the records of the Company. If a quorum fail to attend at the time and place of meeting, those who do attend may adjourn from time to time until the meeting shall be regularly constituted.

Sec. 5. At such meetings, all questions, unless by the by-laws otherwise provided, shall be determined by a majority vote of the stock-holders present in person or by proxy: each stock-holder being entitled to one vote for each share of common stock in his name as

appears upon the record.

Sec. 6. All the meetings of the stock-holders shall be presided over by the President or Vice-President. Such meeting shall be attended by the Secretary of the company, who shall EX-OFFICIO be the secretary of such meeting. The proceedings of each meeting shall be verified by the signature of the President or Vice-President.

ARTICLE II

DIRECTORS

Section 1. The affairs of this company shall be under the management of its Board of Directors and such officers and agents as said Board may elect or employ.

Sec. 2. The Board of Directors shall not be less than three nore more than five in number, the number to be determined by the stock-holders from time to time. Said Directors shall be elected each year at the annual meeting of stock-holders to hold office until the next annual meeting, or until the election of their successors. Vacancies in the Board shall be filled by the Board of Directors. The person elected shall hold office until the next annual meeting of stockholders when the vacancy shall be filled as usual.

Sec. 3. The Board of Directors shall, as soon after their annual election as conveniently may be, elect from their number a President and Vice-President, who

shall hold this office for one year and until others are chosen and qualify in their stead. The Board shall also annually elect a Secretary and Treasurer, (or one person to serve as both Secretary and Treasurer), who need not be members of the Board, and such other officers, agents and factors as they may deem necessary, who shall hold office until others are chosen and qualify in their stead, subject to removal by the Board at any time with or without cause.

Sec. 4. The Board of Directors shall hold its meetings at such times and places as it may designate. A special meeting may be called at any time by the President or any two Directors. Notice of the Directors' Meeting shall be given by mailing notice thereof to each Director 3 days before such meeting.

Sec. 5. A majority of Directors in office shall be necessary to constitute a quorum for the transaction of business. Any question coming before the Board shall be determined by a majority of those present.

ARTICLE III

THE DUTIES AND POWERS OF OFFICERS

Section 1. The President shall preside at all meetings of the Board: shall be ex-officio, a member of all committees; He shall sign all certificates of stock or conveyances of real estate, and any other instrument in writing requiring a signature and perform such other

duties as may be requested of him from time to time by the directors.

Sec. 2. In case of the absence of the President, or his inability to act, his duty shall be performed by the Vice-President, who in that event shall exercise any of the above powers of the President.

Sec. 3. The Secretary-Treasurer shall attend all meetings of the stock-holders and directors and keep a full and accurate account of their proceedings in a book to be kept for that purpose. The Secretary-Treasurer shall keep a full and accurate account of the receipts and disbursements of the company in books belonging to the company, and shall deposit all monies, and like valuable objects in the name of the company in such depositories or safety vaults that may be designated by the Board. A report of the finances of the Company shall be made by the Secretary-Treasurer whenever requested by the President and a report of like character shall be submitted by him at each Annual Meeting.

Sec. 4. The Treasurer shall keep a full and accurate account of receipts and disbursements of the company in books belonging to the company, and shall deposit all moneys and other valuable objects in the name of the company in such depositories or safety vaults that may be designated by the Board. A report of the finances of the Company shall be made by the Treasurer

whenever requested by the president, and report of like character shall be submitted by him at each annual meeting. He shall be required by the Directors at any time to give such bond as the Directors may designate, and in the absence of Treasurer, the President or Vice President is to receive and disburse any moneys for the Corporation.

ARTICLE V

CAPITAL STOCK

All certificates of stock shall be signed by the President and Secretary, and be attested by the Corporate Seal.

Sec. 2. The certificate of stock may be transferred, sold assigned, or pledged by an indorsement to the proper effect in writing on the back of the certificate, and delivery of such certificate by the transferrer to the transferee; provided that until notice given of such transfer to the Secretary of the Company, and the surrender of the certificate of stock for cancellation, and the issue of a new certificate in lieu of that surrendered, this company may regard and treat the transferrer as being still the owner of the stock.

Sec. 3. All surrendered certificates shall be marked; "Cancelled," with the date of cancellation, by the Secretary, and shall be immediately pasted into the stock book opposite memorandum of their issue.

Sec. 4. A duplicate certificate of stock may

be issued for such as may have been lost or destroyed upon the applicant's furnishing affidavit that he is owner of said certificate and that same has been lost or destroyed, together with bond of indemnity, with satisfactory security to the company conditioned upon loss in consequence of issue of said duplicate certificate.

Sec. 5. Any individual stock-holder desiring to sell his stock either in whole or part must first give in writing, the Corporation or remaining stockholders, the opportunity to purchase such stock at par value.

ARTICLE VI

MISCELLANEOUS

Section 1. The Seal of this Company shall be circular in form with the words Beverly Book Company, Inc. on the circumference.

Sec. 2. The fiscal business year of this company shall begin on the first day of January, and end on the thirty-first day of December following each year.

Sec. 3. The Board of Directors may, annually, declare a dividend of such part of the net earnings of the company as it may deem prudent to divide, carrying all or any part of the residue to the surplus account, or account of undivided profits or for use in improvements as it shall deem best.

Sec. 4. By-Laws may be altered, amended, modified or added to by the vote of stock-holders holding

a majority of the stock of the company, present in person or by proxy, at any general, or special meeting (called for that purpose) of stock-holders of the company. A copy of each amended By-Laws shall be sent to each stock-holder within 30 days after their adoption.

[Filed February 27, 1974] * * *

EXHIBIT

[12] CERTIFICATE OF INCORPORATION

OF

BEVERLY BOOK COMPANY, INCORPORATED

This is to certify that we do hereby associate ourselves to establish a corporation under and by virtue of Chapters 147 and 148, Code of Virginia, 1919, and acts amendatory thereof, for the purposes, and under the corporate name hereinafter mentioned, and to that end we do, by this certificate, set forth as follows: 1. the name of the corporation shall be Beverly Book Company, Incorporated. 2. The principal office shall be located in Staunton, Virginia. 3. The purpose for which the said Corporation to be formed is to conduct a general wholesale and retail mercantile business dealing in books, stationery, office supplies and furniture, gifts, novelties, periodicals, and all such merchandise as usually pertains to a book, stationery, office equipment and supply business whether wholesale or retail and if deemed advisable by the corporation, to conduct a job printing

establishment and bindery, and to publish and circulate books, pamphlets, magazines, any or all of these for the corporation or others and to do all things necessary and proper to be done in connection with the said objects and the furtherance of the purposes of said corporation. 4. The maximum amount of capital stock shall be $50,000.00 and the minimum of $10,000.00 divided into shares of the par value of $100.00 each, upon which a dividend, if any, shall be payable annually. 5. The period of duration of the charter shall be unlimited. 6. The names and residences of the officers and directors who for the first year, unless changed by the stockholders, to manage the corporation, are as follows:

Thomas W. Dixon Staunton, Virginia	President and Director
Henry B. Baylor Staunton, Virginia	Secretary, Treasurer and Director
Doris H. Dixon Staunton, Virginia	Vice-President and Director

7. The amount of real estate held at any time by the corporation is 500 acres.

Given under our hands this 10th day of June, 1946.

/s/ Thos. W. Dixon
/s/ Henry B. Baylor
/s/ Doris H. Dixon

[Filed February 27, 1974]

* * *

[21] LETTER OF WILLIAM S. MOFFETT, JR. JUDGE

April 9, 1974

Gentlemen:

A careful reading of the Bill of Complaint and the Provisions of Virginia Code Sections 13.1-94 and 13.1-95 would suggest that the purpose of the Complainant in this proceeding is to cause the Beverly Book Company, Inc. to be liquidated and a disposition of the proceeds to the stockholders after payment of the expenses of liquidation. In other words the Complainant would appear to desire to liquidate his interest in the corporation.

The provisions of Article 3, Section 5 of the By-Laws of the Beverly Book Company, Inc. provides that any stockholder desiring to dispose of his stock (his interest in the corporation) must first afford the corporation or its remaining stockholders the opportunity to purchase such stock at par value. This provision would appear to fix the value of the interest of each stockholder who desires to liquidate said interest.

I am advised by letter from Mr. Timberlake, dated March 29, 1974, that the above mentioned Article 3, Section 5 of the By-Laws was included in the By-Laws of the corporation at the time of the Corporate organization and was presumably agreed to by the Complainant. In view of this

fact, I would feel that the above mentioned By-Laws provision would preclude the Complainant from now coming into Court and saying that the Corporation has not been properly operated and, as a result thereof, he is entitled to liquidate the Corporation and possibly receive more than the par value of his stock. The fact that dividends have never been paid on the capital stock would also seem to be a matter of some significance. (This information may not be a part of the record but probably came from Counsel at a recent pre-trial conference).

It is accordingly considered that the Special Plea filed in this matter by the Defendants is well taken and the prayer of the Bill of Complaint should be denied. It is requested that Mr. Timberlake prepare an appropriate order to be initialed by all Counsel of record and in turn presented for entry.

/s/ Wm. S. Moffett, Jr.

[Filed July 5, 1974]

* * *

[14] DECREE

This cause came on this day to be heard upon the Bill of Complaint and the Special Plea filed on behalf of the respondents, with the exhibits therewith, and was argued by counsel.

And it appearing to the Court, for reasons set forth in the Court's letter to counsel of April 9, 1974,

that said Special Plea is well taken, it is accordingly ADJUDGED, ORDERED and DECREED that said Special Plea be, and it hereby is sustained, and that the Bill of Complaint accordingly be dismissed, to which action of the Court complainant excepts.

/s/ Judge William S. Moffett, Jr.

/s/ Lewis M. Costello
Counsel

/s/ Wayt B. Timberlake, Jr.
Counsel

[Filed May 13, 1974]

* * *

[15] NOTICE OF APPEAL

Petitioner, Henry B. Baylor, does herewith give Notice of Appeal from the Final Judgment Order of the Trial Court which was entered on the 13th day of May, 1974.

No transcript will be filed due to the Court's ruling on the "special plea", with no evidence having been taken. However, a statement of facts will be filed within the period of time required by the rules of the Supreme Court of Virginia; 5:6 and 5:9.

ASSIGNMENTS OF ERROR

Petitoner, Henry B. Baylor, assigns the following errors:

1. The Trial Court erred in sustaining the "special plea." Such plea is, under the facts and

circumstances of this case, not a proper mode of testing the sufficiency of the Bill of Complaint--either under the general requirements of pleading and practice in Virginia, under the Rules of Court of the Supreme Court of Virginia, or the statutory provisions provided by Title 8 of the Code of Virginia, as amended; the proper mode of testing the sufficiency of the Bill of Complaint being through the office of demurrer.

2. The Trial Court erred in sustaining the "special plea", such plea being an improper mode of testing the Bill of Complaint, such responsive pleading properly being the office of demurrer.

3. The Court erred in sustaining the "special plea" as a matter of law, under the facts and circumstances of this case, the sustaining of the plea is contrary to the clear legislative intent of Va. Code 13.1-94 and the law of Virginia under the cases decided in the Supreme Court.

4. The said construction necessarily relied upon by the Trial Court, nulifies the clear legislative intent of 13.1-94 and makes illusory general equitable relief proportedly offered under general law or by virtue of Virginia Corporation statutes, 13.1-1 and 13.1-24, et. seq.

5. The ruling of the Trial Court is unresponsive to the pleadings before the Court, the "special

plea" relying upon Article V, Section 5, but the Court's ruling being based upon Article III, Section 5 of the said by-laws.

6. The Trial Court erred in sustaining the "special plea", the said ruling thereby holding the corporate by-law provisions, whether Article III, Section 5, or Article V, Section 5, or Article V, Section 3, to be the exclusive and sole shareholder remedies, superior to those of the corporate charter, or the general provisions of Va. Code Ann. 13.1-1 et. seq., in contravention of 13.1-24.

7. The Trial Court erred in sustaining the "special plea" based upon any of the by-law provisions of the said corporation; the Court's ruling judicially ratifying possible fraud or waste of the corporate assets by a majority shareholder without any evidence being before the Court. Such ruling was in contravention of properly cognizable equitable rights and remedies of a minority shareholder of a Virginia Corporation.

8. The Trial Court erred in sustaining the "special plea" without any evidence being before the Court, the action of the Court having the effect of voiding the fiduary relationship existing between a majority shareholder of a corporation and minority shareholders of the said corporation.

HENRY B. BAYLOR
By /s/ Lewis M. Costello
Counsel

[Filed May 31, 1974]

* * *

[18] STATEMENT OF FACTS

Plaintiff, owner of 100 shares of the common stock of defendant, Beverly Book Company, Incorporated, brought an action pursuant to Section 13.1-94 of the Code of Virginia, against the Book Company and Thomas W. Dixon, owner of the remaining 297 shares of common stock in the defendant Book Company, alleging in his Bill that the said majority stockholder was acting in an oppressive manner in his control and direction of the Book Company and that corporate assets were being misapplied and wasted by said majority stockholder. The particulars of said allegations are set forth in the Bill and will not be reiterated here.

After due service of process upon the defendants, the defendants filed a Special Plea stating that the By-Laws of the Company provided that if a stockholder wished to dispose of his stock, it must first be offered to the corporation or to the remaining stockholders at par value, and that defendants are willing and able to purchase the 100 shares of stock owned by the plaintiff at par value, or the sum of $10,000.00. The plea alleged that, therefore, the plaintiff could show no loss and could not establish the right to relief under the provisions of Section 13.1-94 of the Code of Virginia.

The merits of this Special Plea were argued by counsel for the parties before Judge William S. Moffett, Jr., Judge of the Circuit Court for the City of Staunton. It was stipulated that the By-Laws contained the provisions set forth in the Special Plea and that the defendants were ready, willing and able to purchase the stock of the plaintiff at its par value. The plaintiff argued that the Special Plea was not the proper mode for testing the sufficiency of the Bill; that the plaintiff had specifically alleged two of the circumstances set forth in Section 13.1-94, any one of which is sufficient to empower the Court to act, to wit, oppresive managerial conduct and misapplication or waste of corporate assets, and that the Special Plea did not address itself to answer either of said allegations; that the plaintiff was not seeking to sell his stock at par value, nor is he compelled to do so, but was seeking judicial aid in righting a wrong; and that the defendant's answer, by Special Plea, if allowed to stand and be upheld, would nullify the remedial effect of Section 13.1-94 and clearly circumvent the legislative purpose in enacting said Section. The defendants argued that the only remedy available to the minority stockholder of the Book Company, by reason of the By-Law provision, was to sell his stock to the corporation or to the majority stockholder at par value. In argument, it was noted that no dividends had

ever been paid by the defendant corporation since its inception.

After considering the arguments of counsel, Judge William S. Moffett, Jr., by letter dated April 9, 1974, addressed to all counsel of record, rendered his opinion that the Special Plea of the defendant was well taken and that the prayer for relief in the Bill of Complaint should be denied. A copy of said letter setting forth the Court's views is appended hereto and asked to be incorporated herein by reference. A certain portion of said letter has been underlined by counsel for plaintiff for emphasis.

HENRY B. BAYLOR
By /s/ Lewis M. Costello
Counsel

[Filed July 5, 1974]