[Cite as *Lautenschleger v. Monarch Mgt., Inc.*, 2004-Ohio-4670.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
SUSAN E. LAUTENSCHLEGER	:	Hon: W. Scott Gwin, P.J.
	:	Hon: William B. Hoffman, J.
Plaintiff-Appellant	:	Hon: Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2003AP120090
MONARCH MANAGEMENT, INC.	:	
AND JEFFREY SMITH	:	
	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil appeal from the Tuscarawas County Court of Common Pleas, Case No. 2002CV090577
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	September 2, 2004

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees
THOMAS W. HARDIN JOHN P. MAXWELL 132 Fair Avenue N.W. New Philadelphia, OH 44663	JAMES F. MATHEWS 400 South Main Street North Canton, OH 44720

[Cite as *Lautenschleger v. Monarch Mgt., Inc.*, 2004-Ohio-4670.]

Gwin, P.J.

{¶1} Plaintiff Susan E. Lautenschleger appeals a judgment of the Court of Common Pleas of Tuscarawas County, Ohio, which declined to judicially dissolve defendant Monarch Management, Inc. Appellant assigns five errors to the trial court:

{¶2} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY NOT JUDICIALLY DISSOLVING THE CORPORATION PURSUANT TO O.R.C. 1701.91 (A)(4) IN THE FACE OF UNDISPUTED EVIDENCE THAT THE PARTIES ARE DEADLOCKED REGARDING THE CONTINUED EXISTENCE OF THE CORPORATION.

{¶3} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY PERMITTING AND CONSIDERING EVIDENCE NOT RELEVANT TO THE SPECIAL STATUTORY PROCEEDING OF A JUDICIAL DISSOLUTION PURSUANT TO R.C.1701.91 (A)(4).

{¶4} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY IGNORING OHIO PRECEDENT AND FOLLOWING INAPPLICABLE FOREIGN CASE LAW IN CONCLUDING THAT THIS SPECIAL STATUTORY PROCEEDING INVOKED ITS EQUITABLE JURISDICTION AND BY APPLYING THE UNCLEAN HANDS DOCTRINE AS A DEFENSE.

{¶5} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN ADOPTING DEFENDANT'S EQUITABLE "EXPECTATION/CONTEMPLATION" DEFENSE.

{¶6} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY ATTEMPTING TO IMPOSE A "CONSTRUCTIVE TRUST" OVER THE SUBJECT CORPORATION."

{¶7} Appellant filed her complaint on September 3, 2002, seeking judicial dissolution of appellee Monarch Management, Inc. Also named in the complaint as a

defendant was appellee Jeffrey Smith, appellant's brother. Appellant and appellee Smith each own 50 percent of the outstanding shares of the Monarch Management, Inc. and are the only officers and directors of the corporation.

{¶8} The trial court adopted appellee's proposed findings of fact and conclusions of law. The vituperative tenor of the findings of fact underscores the hostility present in this case. Monarch Management, Inc. is an Ohio corporation originally formed in 1982 by Brian and Judith Smith, the parties' parents. Brian and Judith Smith each owned 250 shares and were the only shareholders.

{¶9} On December 20, 1995, the parties entered into a contract which would transfer the 500 shares to their three children, appellant, appellee, and a third sibling, Gregory Smith. All parties agreed to the terms of the contract, which, among other things, called for the transfer of Monarch stock to occur over the course of a 6 year period ending December 31, 2001. Upon the transfer of Monarch stock, the shares transferred to Gregory Smith were subject to redemption by the corporation. The redemption agreement was mandatory, and provided Gregory Smith would receive the payout for his shares over a period of ten years, unless he exercised his option for payment in a lump sum of $120,000.

{¶10} In April of 2001, and in June of 2002, Gregory Smith exercised his option to have his shares redeemed for the lump-sum payment of $120,000. When they entered into the contract, the parties contemplated that if Gregory Smith exercised his option, Monarch would be required to borrow the funds to buy him out. Monarch would be able to do so and still continue operations because it would no longer pay a salary and benefits to Brian Smith.

{¶11} On June 21, 2002, appellant acting as President of Monarch, executed a promissory note in the name of Monarch Corporation to borrow the sum of $120,000 to buy back Gregory Smith's shares. Appellee Brian Smith's company, Strasburg Limited, lent Monarch the money. Appellant Lautenschleger personally guaranteed the note, but the party primarily liable on the promissory note is Monarch.

{¶12} The loan from appellee's company to Monarch bound Monarch to a ten-year obligation to pay back the money. The court found this represented an equivalent substitute to the ten-year buyout of Gregory Smith's shares.

{¶13} The court found the parties' original intent when they entered into the 1995 contract was for Monarch to continue business after Gregory Smith's shares had been redeemed.

{¶14} On July 30, 2002, appellant and appellee held a shareholder's meeting. Appellant voted her shares in favor of voluntarily dissolving the corporation and appellee voted his shares in opposition. The court found this evidence was the only proof of an actual disagreement between the shareholders respecting Monarch's continued operations. Contrary to appellant's testimony that the shareholders would not be able to agree on the future, the court found there was no record of any actual disagreement between the shareholders except for the motion to voluntarily dissolve the corporation. The court found there was never a meeting where an effort to elect officers failed, and there was never any disagreement concerning the hiring of any employees.

{¶15} The trial court found at the time appellant borrowed the money from appellee's company and incurred the ten-year obligation for repayment, she had already decided to seek judicial dissolution of Monarch. The court found if Monarch was

dissolved, this would frustrate the underlying consideration for the parties' 1995 share-holders agreement. The court also found on August 12, 2002, appellant filed Articles of Incorporation for a new business entity, Pegasus, which would perform exactly the same business operations as Monarch with Monarch's customers.

{¶16} The court concluded as a matter of law R.C. 1701.91 is a permissive statute rather than mandatory, and provides the court may dissolve a corporation and wind up its affairs if it finds inter alia, the corporation has an even number of directors who are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock. The statute further provides dissolution of the corporation may not be denied on the basis that the corporation is solvent or that it has been or could be conducted at a profit.

{¶17} The court found the corporation should not be dissolved because it would frustrate the intent of the parties in entering into the 1995 contract. Further, dissolution of Monarch would be to "condone" appellant's transaction with Strasburg Limited, in the name of Monarch, as a sham transaction. The court found equity precluded such a finding.

{¶18} The court also found it could not, sitting in equity, condone the formation of Pegasus for the purpose of "raping" Monarch on the eve of filing a petition to dissolve it. The court found appellant attempted to "freeze out" appellee from Monarch's business.

I & II

{¶19} In her first two assignments of error, appellant urges the trial court erred as a matter of law by not judicially dissolving the corporation on the face of undisputed evidence the parties are deadlocked concerning the continued existence of the

corporation and by considering evidence and equity not permitted by Ohio law. We agree.

{¶20} The focus of our review must be R.C.1701.91, which provides when it is established a corporation has an even number of directors who were deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, then the court may dissolve the corporation. The trial court found there was only one meeting at which the parties deadlocked, but we find the issue was over the most basic one, namely, the continuing of the corporation.

{¶21} Additionally, the trial court's approach is too restricted. The court limited itself to reviewing a single meeting between the parties. However, this is a family corporation, and it is clear from the testimony not only are appellant and appellee unable to deal together in the corporation, but the family relationships have completely broken down. Appellant and her father, Brian Smith both testified because of the problems with Monarch, appellee has completely cut off his relationship with his parents, to the extent he will not speak to them, and would not permit his parents to interact with their grandchildren.

{¶22} Monarch Management's sole business is the management of six different apartment complexes. Four are still owned by Brian and Judith Smith, and the other two are owned by a three person partnership including appellant, appellee, and Greg Smith. There was testimony indicating Brian Smith no longer wished for Monarch Management to manage any properties he owned so long as appellee was involved in Monarch Management. It is difficult to construe this testimony in any other manner other than to find that the corporation is in serious trouble because of the disputes between appellant

and appellee. Although appellee attempts to demonstrate the disagreements between the parties are one sided, appellant testified she offered to attempt to run Monarch Management as 50-50 owners, and appellee allegedly replied he would "burn in hell" before he would remain partners with her. In June of 2001, appellant sent a letter to appellee informing him she felt she had no choice but to dissolve the company once their brother's shares had been redeemed. Appellant testified she attempted to resolve the dispute because their mother felt she had lost her son, her daughter-in-law, and her grandchildren. Appellant testified she made an offer in excess of what she thought Monarch was worth in the hope of achieving family harmony.

{¶23} The trial court found appellant's establishment of Pegasus Corporation was an attempt to raid Monarch's business, but it does not appear to this court, Monarch would be able to continue business as usual. Of the six apartment complexes Monarch manages, Brian Smith, who owns four, indicated he no longer wished for Monarch Management to manage his properties. The other two properties are owned by a three-person partnership between appellant, appellee, and Greg Smith. Appellant testified her father contacted her brother Greg regarding changing the management of the two properties of which the brother was a partner from Monarch to Pegasus. Appellant testified she did not communicate directly with her brother, and did not know whether her father had contacted appellee, but she contemplated taking on management of the six properties to Pegasus from Monarch. Thus it appears Monarch Management will have no properties to manage.

{¶24} The trial court found it may be appropriate to impose a constructive trust over Pegasus, in effect retaining the six apartment complexes' business for Monarch.

Because the property owners are not parties to this action, they could withdraw their properties from Pegasus, resulting in a second corporation with no properties to manage. R.C. 1701.91 directs the court should not deny dissolution on the grounds the corporation is solvent or could be conducted at a profit. Here, the trial court denied dissolution and attempted to restore Monarch's profitability.

{¶25} We find there was no evidence presented to the trial court from which it could conclude the parties are not hopelessly deadlocked. We find the trial court erred as a matter of law in applying the statute to the undisputed facts. The first and second assignments of error are sustained.

III, IV, & IV

{¶26} R.C. 1701.91 (A)(2)(c) provides a court of common pleas may dissolve a corporation when it appears that the objects of the corporation have wholly failed or are entirely abandoned or that their accomplishment is impracticable. Although appellant did not bring her action pursuant to this section of the statute, it appears it would apply as well.

{¶27} In *Chomczynsky v. Cinna Scientific, Inc.,* Hamilton Appellate No. C-010170, 2002-Ohio-4605, the Court of Appeals for the First Appellate District held without any business or agents, a corporation's objects have wholly failed and their accomplishment is impractical. The court refused to apply the Doctrine of Unclean Hands because the dissolution of a corporation is purely statutory, and a court's equitable jurisdiction is not invoked, *Chomczynsky,* paragraph 19, citing *Civil Service Personnel Association v. Akron* (1976), 48 Ohio St. 2d 25, 356 N.E. 2d 300.

{¶28} Likewise, in *Herbert v. Porter,* Seneca Appellate No. 13-03-53, 2004-Ohio-1851, the Court of Appeals for the Third Appellate District found there is no statutory requirement that the trial court explore alternative remedies before ordering judicial dissolution.

{¶29} Finally, the case of *Frank Lerner & Associates, Inc. v. Vassy* (1991), 74 Ohio App. 3d 537, 599 N.E. 2d 734 is instructive. In *Vassy,* the Court of Appeals for the Tenth District found where majority shareholders breach their fiduciary duties to minority shareholders by usurping corporate opportunities, the majority shareholders were required to transfer back corporate opportunities and assets of the corporation and to account for the profits earned therefrom. Instead of an equitable constructive trust, the Franklin County Court of Appeals directed that, if the requirements for judicial dissolution had been met, then the majority shareholders' wrongly acquired assets should revert back to the corporation and its business should be wound up. In this way, a court properly applies the statutory scheme for corporations and preserves the rights of the shareholders. We find this procedure would restore Monarch's assets so it could be dissolved and its assets distributed. There is a pending action for breach of fiduciary duty between the parties. We further find the trial court erred in applying equitable principles.

{¶30} In conclusion, we find the trial court's decision was contrary to Ohio law, and appellant's third, fourth, and fifth assignments of error are sustained.

{¶31} For the foregoing reasons, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is reversed, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J., and

Farmer, J., concur

Hoffman, J., dissents

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JUDGES

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Hoffman, J., dissenting

{¶32} I respectfully dissent from the majority opinion.

{¶33} Despite the fact the parties are deadlocked over whether the corporation should continue to exist, and despite the fact the family relationship between the parties has completely broken down, the trial court still must determine whether the parties are deadlocked in the management of the corporation affairs. Although appellant testified, in her opinion, she did not believe she and appellee will be able to reach any agreement with respect to the management of the company, there was no evidence the parties were unable to elect directors, hire employees, or otherwise manage the corporation. Given the discretionary power afforded to the trial court pursuant to R.C. 1701.91(A)(4), I find the trial court's decision not to grant judicial dissolution is not an abuse of discretion even though the parties are deadlocked over whether to continue the corporate existence. I do not find deadlock over whether the dissolve the corporation equivalent to deadlock over the management of the corporation. Had the legislature intended the former to be sufficient to allow judicial dissolution of a corporation, it could have easily provided for such contingency in the statute.

{¶34} I would affirm the judgment of the trial court.[1]

[1] I find the trial court's reliance on the parties' expectations surrounding the December 20, 1995 shareholder agreement misplaced.

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IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

SUSAN E. LAUTENSCHLEGER	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
MONARCH MANAGEMENT, INC. AND JEFFREY SMITH	:	
Defendants-Appellees	:	CASE NO. 2003AP120090

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of Court of Common Pleas of Tuscarawas County, Ohio, is reversed, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion. Costs to appellees.

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JUDGES