

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 91535**

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**DAVID V. LEE, ET AL.**

PLAINTIFFS-APPELLANTS

VS.

**RICHARD SCALDINI, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
DISMISSED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CV-640795, CV-644109, and CV-657592

**BEFORE:** Kilbane, P.J., Boyle, J., and Jones, J.

**RELEASED:** May 28, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P. J.:

{¶ 1} Plaintiffs-appellants David V. Lee (Lee) and Dr. Daniel F. Ho (Ho) appeal the trial court's preliminary injunction against them and a judgment entry granting Special Master Mark Dottore's (Dottore) motions for an order authorizing the sale of all, or substantially all, of David N. Myers University's (Myers) assets. For the following reasons, we dismiss.

{¶ 2} The facts giving rise to the instant case center around the sale of Myers, a nonprofit corporation and institution of higher learning, organized under Ohio law, governed by a twenty-one member Board of Trustees, and located in Cleveland, Ohio.

{¶ 3} In July 2006, the United States Department of Education advised Myers that it failed to meet the standards for financial responsibility pursuant to Section 688.172, Title 34, C.F.R.

{¶ 4} As a result thereof, Myers posted an irrevocable letter of credit in the amount of \$1,206,801 to the United States Department of Education. Samuel H. Miller (Miller), Albert B. Ratner (Ratner), and Carl Glickman (Glickman), guaranteed \$400,000 of the \$1,206,801, on the condition that should a change in control of Myers occur they would be released from their responsibilities as guarantors.

{¶ 5} Also, in May 2007, Myers received \$2,000,000 from the University of Northern Virginia Properties, LLC (UNVA); in exchange, fifteen individuals affiliated with UNVA were voted onto Myers' Board of Trustees, thus constituting a majority of members. It must be noted that Ho owns 100 percent of UNVA and is one of the newly elected Board of Trustee members.

{¶ 6} On November 5, 2007, in case number CV-640795, Miller, Ratner, and Glickman filed a complaint against Myers for breach of contract and demanded damages, declaratory judgment, and an injunction for never having been released from their guarantee despite the change in control of Myers' Board of Trustees.

{¶ 7} On December 10, 2007, in case number CV-644109, Lee, Ho, and thirteen other members of the Board of Trustees that are affiliated with UNVA filed a complaint alleging breach of fiduciary duty for wrongful removal of trustees and for wrongful closure of Myers, and sought declaratory and injunctive relief. They also filed an emergency motion for a temporary restraining order and a preliminary injunction.

{¶ 8} The complaint, consisting of personal and derivative claims, allege that the named defendants sought to wrongfully remove eleven of the plaintiffs from the Board of Trustees, thus preventing them from exercising their power to vote on the recent issue of whether to close Myers. The complaint further avers that upon removal, the Executive Committee of the Board of Trustees voted to close Myers at a meeting held on December 10, 2007.

{¶ 9} The following were named defendants: Myers; Richard Scaldini, President of Myers; Timothy S. Miesse, Secretary and General Counsel for Myers; Michael G. Herzak, Chairman of the Board of Trustees; and lastly, board members A. Lamont Mackley, Anthony O. Calabrese III, Robert L. Briechele, Daniel E. Lamparyk, and James G. Pilla.

{¶ 10} On December 11, 2007, the trial court journalized the following: “By agreement of the parties, David N. Myers University shall remain as an ongoing entity, up to and including 12/14/07, at which time an effort shall be made by and between the parties in the presence of the court to reach a global resolution of outstanding financial issues.” Thereafter, the matter was set for hearing on December 14, 2007.

{¶ 11} On the same day, the trial court also journalized: “All parties in this action are hereby restrained from issuing any public comments about the pending status of this litigation. This court will enforce said order with both the civil and criminal contempt powers of court.”

{¶ 12} On December 12, 2007, the trial court enjoined Myers as follows:

“This court hereby restrains and restricts disbursement, transfer, or diminution of any funds or accounts of David N. Myers University.

All accounts of David N. Myers University are attached until further order of this court. No disbursements to be made from said accounts without prior approval of this court.

The current administrators of David N. Myers University shall provide the court with an accounting of all accounts by Friday December 14, 2007 at 12:30 p.m.

The court further orders that all relevant documentation of the administrative activities of David N. Myers University be safeguarded. No shredding or purging of electronic documents shall take place.

This order is enforceable by possible indication of the civil and criminal contempt powers of this court.”

{¶ 13} On the same day, the trial court appointed Dottore as Special Master of Myers pursuant to R.C. 2735.01.

{¶ 14} On December 12, 2007, James G. Pilla was dismissed without prejudice.

{¶ 15} On December 13, 2007, the trial court conducted a show cause hearing as to why Scaldini should not be held in contempt of court for violating its order restraining the parties from issuing public comments about the pending status of the litigation, and thereafter remanded him to the Cuyahoga County Jail for twenty-four hours. See *In re contempt of Scaldini*, Cuyahoga App. No. 90889, 2008-Ohio-6154, affirmed in part, reversed in part.

{¶ 16} Nothing in the record indicates that the hearing scheduled December 14, 2007, went forward, although the trial court lifted the December 11, 2007 restraining order because a Board of Trustees meeting was scheduled to take place on December 19, 2007.

{¶ 17} On December 19, 2007, in CV-644109, all plaintiffs, except for Lee and Ho, dismissed their claims without prejudice, and all defendants were dismissed without prejudice except for Myers and Michael G. Herzak.

{¶ 18} On January 9, 2008, case numbers CV-640795 and CV-644109 were consolidated.

{¶ 19} On January 11, 2008, the trial court granted the motion to intervene filed by the State of Ohio, via the Attorney General of Ohio.

{¶ 20} On January 15, 2008, the docket reflects an agreed order in which Dottore would remain as Special Master until further order of the court. The trial court also retained continuing jurisdiction over the case.



{¶ 21} On January 28, 2008, the Ohio Attorney General filed an answer and counterclaim asserting the following: that the fifteen named plaintiffs in CV-644109 are members of Myers' Board of Trustees and are also affiliated with UNVA, a for-profit organization; all members of the Board of Trustees have resigned except for the plaintiffs; UNVA expressed an interest in acquiring Myers; plaintiffs have an inherent conflict of interest regarding its duties to Myers and UNVA; the fiduciary duty of loyalty requires trustees with conflicts of interest with respect to particular actions that come before the board to disclose those conflicts and refrain from voting on the action or influencing the vote on the action; and lastly, plaintiffs cannot take action regarding UNVA without violating their fiduciary duties of loyalty to Myers.

{¶ 22} On February 5, 2008, the trial court enjoined the Board of Trustees from:

"[T]aking any and all actions, including but not limited to, voting upon, consenting to, approving or adopting any resolution or other action; and it is further

ORDERED that the Board be and it is hereby stayed and enjoined from taking any action upon any resolution previously passed by the Board; and it is further

ORDERED that the Board, and the individual members of the Board who are of record on January 31, 2008, be and each of them is, hereby stayed and enjoined from directing any officers, employees or agents to take any action to implement decisions made heretofore by the Board, and it is further

ORDERED that this order be and it is hereby effective as of the date here entered and until such time as the claims made by the Attorney General in its Answer and Counterclaim have been heard and decided."

{¶ 23} In support thereof, the trial court cited to the Ohio Attorney General's answer and counterclaim and the Ohio Charitable Trust Act, R.C. 109.23, et seq. On April 8, 2008, the trial court granted the Cleveland Cuyahoga County Port Authority's motion to intervene, and on April 15, 2008, granted the motion to intervene of Myers University Federation of Teachers, Local 3499, AFT, AFL-CIO.

{¶ 24} On April 15, 2008, Dottore filed a motion on behalf of Myers for an order authorizing the sale of all or substantially all of Myers' assets.

{¶ 25} On April 23, 2008, in a third case, CV-657592, Dottore filed a complaint to sell real property and to determine the validity, priority or extent of a lien or other interest in real property and named as defendants Huntington National Bank as Trustee and Jim Rokakis in his capacity as County Treasurer.

{¶ 26} On April 28, 2008, CV-657592 was consolidated with CV-640795 and CV-644109.

{¶ 27} On April 29, 2008, the trial court conducted a hearing on Dottore's motion for authorization to sell all, or substantially all, of Myers' assets, although subsequent sale to the proposed highest bidder failed. Lee and Ho also submitted a bid, however, it failed to conform to bidding requirements.

{¶ 28} On May 14, 2008, Dottore filed a second motion on behalf of Myers for an order authorizing the sale of all, or substantially all, of Myers' assets. On May 16, 2008, Lee and Ho submitted another bid, again failing to conform to bidding requirements.

{¶ 29} On May 19, 2008, the trial court conducted a hearing on the matter. Dottore recommended sale to the highest bidder, Myers 160, and did not recommend Lee and Ho. The proposed sale also released Miller, Ratner and Glickman from their guarantee, and also addressed the concerns of Myers University Federation of Teachers, Local 3499, AFT, AFL-CIO, regarding the faculty's future.

{¶ 30} On May 20, 2008, the trial court granted Dottore's second motion for an order authorizing the sale of Myers' assets.

{¶ 31} On August 21, 2008, Dottore and Myers 160 entered into an Asset Purchase Agreement. Thereafter, ownership of real property, tangible property, and other assets transferred to Myers 160. In exchange, Myers 160 paid \$5,250,000 for Myers and the parties negotiated payment of liens.

{¶ 32} Currently, Myers is operating as Chancellor University.

{¶ 33} Lee and Ho appeal and assert four assignments of error for our review.

#### ASSIGNMENT OF ERROR NUMBER ONE

The trial court erred in authorizing the sale of all or substantially all of the assets of Myers University."

#### ASSIGNMENT OF ERROR NUMBER TWO

"The trial court erred as a matter of law by enjoining the Board of Trustees from exercising their statutory authority under Ohio law to govern Myers University, including their authority to decide whether to sell substantially all of the assets of Meyers University to a third party."

#### ASSIGNMENT OF ERROR NUMBER THREE

“The trial court erred by authorizing the sale of substantially all of Myers University’s assets without permitting any discovery.”

#### ASSIGNMENT OF ERROR NUMBER FOUR

“The trial court erred by authorizing the sale of substantially all of the Myers University’s assets without providing fair consideration of the alternative offers and plans that were submitted by plaintiffs Ho and Lee.”

{¶ 34} Prior to addressing Lee’s and Ho’s assignments of error, the record reveals that Lee and Ho participated in the sale of Myers’ assets not only as members of the Board of Trustees but also by entering two bids as potential purchasers. The record also reveals that Lee’s and Ho’s bids were not chosen because they were not the highest bidder. Lee and Ho request that this court rescind the sale.

{¶ 35} Lee and Ho did not motion the trial court to stay the sale, did not appeal the appointment of a Special Master, and did not appeal the contested injunction. In the interim, Myers’ assets sold to Myers 160.

{¶ 36} According to the United States Supreme Court, the doctrine of mootness is described as follows:

“The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.” *Mills v. Green* (1895), 159 U.S. 651.

{¶ 37} However, exception to his general rule exists. For example, we may consider an appeal that is otherwise moot where the issues raised are capable of repetition yet evade review. *State ex rel. Bona v. Village of Orange*, 85 Ohio St.3d 18, 1999-Ohio-431. "This exception applies when the challenged action is too short in duration to be fully litigated before its cessation or expiration, and there is a reasonable expectation that the same complaining party will be subject to the same action again." *State ex rel. Dispatch Printing Co. v. Loudon*, 91 Ohio St.3d 61, 2001-Ohio-268.

{¶ 38} In the case sub judice, Myers' assets were sold pending appeal, rendering it impossible for this court, if it should decide the case in favor of Lee and Ho, to grant them any effectual relief.

{¶ 39} Furthermore, as the Ninth Appellate District held:

"There is no remedy this Court could grant that would affect the matter at issue before us \*\*\*. Accordingly, we find that the issue before us is moot. We also find that neither of the exceptions to the doctrine of mootness applies. This is not an issue subject to repetition, nor is it one that concerns a matter of public or great general interest." *Boneck v. Stewart*, 9<sup>th</sup> Dist. No. 21054, 2002-Ohio-5778.

{¶ 40} We find the same pertaining to the facts of this case. The present appeal is moot.

Appeal dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY  
LARRY A. JONES, J., CONCURS