STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY THOMAS and ROOTWELL, INC.,

Plaintiffs-Appellants,

v

DEPARTMENT OF LABOR AND ECONOMIC GROWTH, BUREAU OF COMMERCIAL SERVICES,

Defendant-Appellee.

UNPUBLISHED
December 16, 2008

No. 280918
Ingham Circuit Court
LC No. 07-000664-AW

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

Plaintiff Jeffrey Thomas is the sole incorporator and resident agent of plaintiff Rootwell, Inc.[1] Plaintiff[2] appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant. We affirm.

Rootwell, Inc., was initially incorporated by Thomas on May 30, 1997. MCL 450.1911 imposes a duty on corporations to file annual reports no later than May 15 of each year. MCL 450.1801(1)(f) allows a corporation to be dissolved "[a]utomatically, under section 922 [MCL 450.1922], for failure to file an annual report or pay the filing fee." However, MCL 450.1922(1) provides a grace period for corporations that fail to file an annual report or pay a filing fee:

> If a domestic corporation neglects or refuses to file any annual report or pay any annual filing fee or a penalty added to the fee required by law, and the neglect or refusal *continues for a period of 2 years from the date on which the annual report or filing fee was due, the corporation shall be automatically dissolved 60 days after the expiration of the 2-year period.* The administrator shall notify the

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[1] All references to Rootwell, Inc., in this opinion refer to the corporation as it existed before the dissolution of the corporation in July 2006.

[2] Use of the term plaintiff in this opinion refers to Jeffrey Thomas.

> corporation of the impending dissolution not later than 90 days before the 2-year period has expired. [Emphasis added.]

In short, this automatic dissolution can occur *only* after two years plus sixty days. If that period has not yet elapsed, the corporation can file the missing annual reports or pay whatever fee it owes to have its good standing with the state restored because, to paraphrase the statute, the corporation has not yet been dissolved. After two years plus sixty days, subsequent compliance with statutory filing requirements will renew the previously dissolved corporate status. MCL 450.1925. However, MCL 450.1925 provides for the selection of another corporate name if the corporation's name does not comply with MCL 450.1212 at the time the corporation is renewing its existence.[3] Pursuant to MCL 450.1212(1)(b)(*i*), the corporate name of a domestic corporation "Shall distinguish the corporate name upon the records in the office of the administrator from . . . the corporate name of any other domestic corporation or foreign corporation authorized to transact business in this state."

In this case, plaintiff failed to file the annual reports for 2004, 2005, and 2006, and to pay the accompanying fees. There is no dispute that Rootwell, Inc., automatically dissolved on July 15, 2006, for failure to file the 2004 annual report. On February 22, 2007, another individual, David Allen, filed Articles of Incorporation under the name Rootwell, Inc.[4] Plaintiff allegedly did not learn until on or about March 7, 2007, that the annual reports had not been filed. On that date, plaintiff filed the 2004, 2005, and 2006 annual reports and paid the required fees. At the same time, plaintiff filed a Certificate of Amendment to the Articles of Incorporation changing the name of the corporation to Rootwell Products, Inc. The Certificate of Amendment indicates that the name change was adopted on December 27, 2006.

Plaintiff filed a complaint for mandamus and injunctive relief on May 23, 2007.[5] Plaintiff alleged that Rootwell, Inc. was improperly dissolved under the automatic dissolution pursuant to MCL 450.1922(1) because defendant failed to notify plaintiff of the impending dissolution as required by § 1922(1). Plaintiff sought a writ of mandamus ordering defendants to register the name "Rootwell, Inc." to plaintiff. Plaintiff asserted that because Rootwell, Inc. did

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[3] Although a domestic corporation which has been dissolved under subsection (1) of section 922 may renew its corporate existence by filing the reports and paying the fees for the year for which they were not filed and paid, "the administrator may require the corporation to adopt or use within this state a corporate name that conforms to the requirements of section 212" [MCL 450.1212]. MCL 450.1212(1)(b)(*i*) states that the corporate name of a domestic corporation "Shall distinguish the corporate name upon the records in the office of the administrator from . . . the corporate name of any other domestic corporation or foreign corporation authorized to transact business in this state."

[4] There is no dispute that if Rootwell, Inc., was properly dissolved then another entity could register the name Rootwell, Inc.

[5] According to plaintiff, the "thrust of this case is that plaintiff filed this action claiming that defendants improperly dissolved the corporation in violation of MCL 450.1922(1), and as a consequence the corporate name "Rootwell, Inc." was placed back into the corporate marketplace, and was secured by another entity."

not automatically dissolve, defendant did not have authority to allow another entity to use the name Rootwell, Inc., but, rather, had a duty to allow plaintiff to select the name.

Defendant filed a motion for summary disposition, asserting that it complied with the notice requirement of MCL 450.1922(1), and that Rootwell, Inc., was properly automatically dissolved. Upon the dissolution, another entity acquired the lapsed name and plaintiff no longer had the right to select the name "Rootwell, Inc."[6] Defendant maintained that it had no legal duty or legal authority to return the name Rootwell, Inc., to plaintiff, and therefore plaintiff could not maintain an action for mandamus.

Following a hearing on the motion, the trial court granted summary disposition in favor of defendant, finding in part that the language in MCL 450.1922(1) providing for automatic dissolution is mandatory without regard to whether defendant provided notice to the corporation. Nonetheless, the trial court found that defendant provided notice, and that defendant had no legal duty to restore the name "Rootwell, Inc." to plaintiff.

Plaintiff first argues that the trial court erred by finding that the 90-day notice provision in MCL 450.1922(1) is not a condition precedent to the automatic dissolution provision, and by finding that defendant properly provided notice of the impending dissolution pursuant to MCL 450.1922(1). We need not determine whether the 90-day notice provision is a condition precedent to the automatic dissolution provision, however, because there is no genuine issue of fact that defendant notified plaintiff of the impending dissolution in sufficient time to allow plaintiff to file the delinquent 2004 annual report before automatic dissolution of the corporation would occur.

Plaintiff maintains that defendant failed to present evidence to establish that defendant provided plaintiff with the notice required by MCL 450.1922(1). We disagree. Defendant presented the affidavit and deposition testimony of G. Anna Baker. Baker is the director of the Corporation Division, Bureau of Commercial Services of the Department of Labor and Economic Growth, the agency responsible for the registration of domestic and foreign corporations. While plaintiff is correct in the assertion that Baker did not have *personal* knowledge that defendant provided the notice to plaintiff, Baker explained that she would never have personal knowledge with regard to any one particular notice out of all the notices that are generated and mailed annually. Baker explained in detail the "automated process used in creating and mailing notices to corporations scheduled for statutory dissolution." According to Baker, because plaintiff did not file the required 2004 annual report, a notice of impending

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[6] Although a domestic corporation which has been dissolved under subsection (1) of section 922 may renew its corporate existence by filing the reports and paying the fees for the year for which they were not filed and paid, "the administrator may require the corporation to adopt or use within this state a corporate name that conforms to the requirements of section 212" [MCL 450.1212]. MCL 450.1212(1)(b)(*i*) states that the corporate name of a domestic corporation "Shall distinguish the corporate name upon the records in the office of the administrator from . . . the corporate name of any other domestic corporation or foreign corporation authorized to transact business in this state."

dissolution was automatically generated and mailed on or about March 1, 2006, by first class mail to Thomas as the resident agent at the address on file with defendant. Plaintiff did not present any evidence to dispute Baker's testimony that a notice of impending dissolution was sent on or about March 1, 2006, to all profit corporations that were required to file a 2004 annual report and had failed to file a 2004 annual report or to pay the required fee. Whether or not plaintiff actually received the notice is not relevant to a determination of whether defendant complied with the notice requirement.

Plaintiff also argues that, even if defendant mailed notice of the impending dissolution, the notice was not provided in a timely manner. Pursuant to MCL 450.1922(1), "the administrator shall notify the corporation of the impending dissolution not later than 90 days before the 2-year period has expired." The 2-year period expired on May 15, 2006. Thus, defendant provided notice of the impending dissolution only 75 days before the 2-year period expired. However, MCL 450.1922(1) was amended in 1993[7] to add 60 days to the expiration date of the two-year period, so a corporation will always have at least 90 days to submit a missing annual report before automatic dissolution occurs. Here, approximately 135 days elapsed from the date defendant mailed the notice of impending dissolution until the date the corporation was automatically dissolved. Plaintiff failed to file the 2004 annual report until March 7, 2007, approximately eight months after the corporation automatically dissolved. Plaintiff's position was clearly not prejudiced by the timing of defendant's notice as it is clear that another fifteen days' notice would not have had any effect on the timing of plaintiff's filing of the 2004 annual report. Under these circumstances, the trial court properly granted summary disposition in favor of defendant.[8]

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

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[7] 1993 PA 91, effective October 1, 1993.

[8] The remainder of plaintiff's arguments are premised on a finding that Rootwell, Inc. was improperly automatically dissolved as a result of defendant's failure to provide timely notice of the impending dissolution. Because we have concluded that the corporation properly automatically dissolved, we need not address the remaining arguments.