NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 2247

TIMMY AND SHELLY BIHM

VERSUS

DECA SYSTEMS, INC. AND GERALD CALLAWAY

Judgment rendered June 6, 2014.

* * * * * *

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 598516
Honorable Timothy E. Kelley, Judge

* * * * * *

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* * * * * *

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

PETTIGREW, J.

This is an appeal by the plaintiffs, Timmy and Shelly Bihm (the Bihms), of a judgment that granted the defendants' exception of no right of action and dismissed the Bihms' petition for involuntary dissolution of a corporation. For the following reasons, we affirm.

BACKGROUND FACTS

The defendant company, Deca Systems Inc. (Deca), in the business of calibrating and certifying industrial instrumentation, as well as repairing, renting, and selling such, was incorporated by Mr. Gerald Callaway (Mr. Callaway) in 1982. The plaintiffs, Timmy and Shelly Bihm, were employees of Deca. On August 17, 1998, Callaway transferred twenty-four (24) shares of stock to Timmy Bihm. (The transfer was gratuitous; no monies were exchanged.) On April 10, 2008, Mr. Callaway, again, gratuitously transferred twelve (12) additional shares of stock to Mr. Bihm. This second transfer gave Mr. Bihm a total of thirty-six (36) of the seventy-five (75) issued shares of Deca, making him a 48 percent (minority) interest shareholder. Mr. Callaway owned the remaining 39 shares of stock, which made him a 52 percent (majority) interest shareholder.

At a meeting held on the same date as the transfer of the additional 12 shares of stock to Mr. Bihm -- allegedly with the approval of Mr. Callaway *and Mr. Bihm*, and prior to the donations of additional shares of stock to Mr. Bihm -- Deca's Articles of Incorporation were amended, as follows:

> ARTICLE VII
>
> Whenever the affirmative vote of shareholders is required to authorize or constitute corporate action, *the consent* in writing to such action signed *only by shareholders holding Fifty One (51%) Percent of the total voting power* on the question *shall be sufficient* for that purpose, *without necessity for a meeting of shareholders*. (Emphasis added.)

Subsequently, on November 2, 2010, Deca's Articles of Incorporation were again amended, this time by only Mr. Callaway, as follows:

> ARTICLE VIII
>
> An *action for the involuntary dissolution of the corporation can be brought by any shareholder* or shareholders, severally

> or jointly, who have been registered owners, for a period of not less than five (5) years *holding not less than fifty one percent (51%)* of the entire outstanding shares of the corporation. (Emphasis added.)

In July 2010, Ms. Bihm resigned from her position as bookkeeper for Deca; and in November 2010, Mr. Bihm also resigned from his position as secretary and employee of Deca. The parties dispute the reasons for such resignations, but the working relationships obviously deteriorated. Reconventional demands remain in this case addressing some of the issues arising from the deterioration of those working relationships. After resigning, the Bihms requested that Mr. Callaway pay them $750,000.00 for the shares of stock that had been donated to Mr. Bihm. Mr. Callaway refused, and this litigation ensued.

PROCEDURAL HISTORY

On January 21, 2011, the Bihms filed a Petition for Involuntary Dissolution of a Corporation, naming Mr. Callaway and Deca as defendants. The Bihms asserted they were qualified to request such dissolution pursuant to La. R.S. 12:143 B(1), by virtue of having been, for a period of not less than six months, owners of not less than twenty percent (20%) of the entire amount of outstanding shares of Deca. They further asserted that they were seeking dissolution pursuant to La. R.S. 12:143 A(7) because the corporation "has been guilty of gross and persistent *ultra vires* acts." Those acts alleged in the petition are (1) consistent failure to follow corporate formalities in accordance with the corporate laws of Louisiana; (2) called an impromptu shareholder/board of directors meeting without proper notice to conduct business; (3) destroyed company records and other documents; and (4) paid health insurance for individuals not employed by the company. Discovery contained in the record reveals that the meeting of which the Bihms complain is the November 2, 2010 meeting wherein Mr. Callaway amended the Articles of Incorporation without prior notice to Mr. Bihm.

The defendants filed numerous motions, including the exception of no right of action, the granting of which is the subject of this appeal, and an exception of no cause of

action, the denial of which is the subject of the answer to the appeal by the defendants. By judgment dated June 6, 2013, the trial court also dismissed the plaintiffs' claims.

DO THE BIHMS HAVE A RIGHT OF ACTION TO SEEK DISSOLUTION OF DECA?

APPLICABLE LAW

NO RIGHT OF ACTION

In **OXY USA Inc. v. Quintana Production Co.**, 2011 CA 0047, p. 12 (La. App. 1 Cir. 10/19/11), 79 So.3d 366, 376, writ denied, 2012-0024 (La. 3/2/12), 84 So.3d 536, this court summarized the law governing exceptions of no right of action as follows:

> Generally an action can only be brought by a person having a real and actual interest that he asserts. La.Code Civ. P. art. 681. The peremptory exception pleading the objection of no right of action tests whether the plaintiff has any interest in judicially enforcing the right asserted. *See* La.Code Civ. P. art. 927(A)(6). Simply stated, the objection of no right of action tests whether this particular plaintiff, as a matter of law, has an interest in the claim sued on. ***Louisiana State Bar Association v. Carr and Associates, Inc.,*** 2008–2114, p. 8 (La.App. 1 Cir. 5/8/09), 15 So.3d 158, 165; *writ denied,* 2009–1627 (La.10/30/09), 21 So.3d 292. The exception does not raise the question of the plaintiff's ability to prevail on the merits nor the question of whether the defendant may have a valid defense. ***Falcon v. Town of Berwick,*** 2003–1861, p. 3 (La.App. 1 Cir. 6/25/04), 885 So.2d 1222, 1224. Unlike the objection of no cause of action, evidence supporting or controverting an objection of no right of action is admissible for the purpose of showing that the plaintiff does not possess the right he claims or that the right does not exist. ***Robertson v. Sun Life Financial,*** 2009–2275, p. 6 (La.App. 1 Cir. 6/11/10), 40 So.3d 507, 511; ***Thomas v. Ardenwood Properties,*** 2010–0026, p. 6 (La.App. 1 Cir. 6/11/10), 43 So.3d 213, 218, *writ denied* [,] 2010–1629 (La.10/8/10), 46 So.3d 1271, *quoting* ***Falcon,*** 2003–1861 at p. 3, 885 So.2d at 1224. The party raising a peremptory exception bears the burden of proof. ***Falcon,*** 2003–1861 at p. 3, 885 So.2d at 1224. To prevail on a peremptory exception pleading the objection of no right of action, the defendant must show that the plaintiff does not have an interest in the subject matter of the suit or legal capacity to proceed with the suit. *Id.* Whether a plaintiff has a right of action is ultimately a question of law; therefore, it is reviewed *de novo* on appeal. ***Torbert Land Co., L.L.C. v. Montgomery,*** 2009–1955, p. 4 (La.App. 1 Cir. 7/9/10), 42 So.3d 1132, 1135, *writ denied,* 2010–2009 (La.12/17/10), 51 So.3d 16.

LOUISIANA BUSINESS CORPORATION LAW

Louisiana's Business Corporation law, in La. R.S. 12:31, provides the following regarding a corporation's right to amend its articles of incorporation:

> A. A corporation may, in the manner herein provided, amend its articles in any respect, to effect a reclassification of its stock, to include or change any provision authorized by this Chapter, or to omit any provision not required by this Chapter.
>
> B. Except as hereinafter provided in this Section, an amendment altering the articles may be adopted by a vote of at least two-thirds of the voting power present, or by such larger or smaller vote (not less than a majority) of the voting power present or of the total voting power as the articles may require, at an annual or special meeting of shareholders, the notice of which shall set forth the proposed amendment or a summary of the changes to be made thereby.
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> C. (1) If an amendment would adversely affect the rights of the holders of shares of any class or series, then in addition to the vote required by Subsection B of this Section, the holders of each class or series of shares so affected by the amendment shall be entitled to vote as a class upon such amendment, whether or not by the terms of the articles such class or series is entitled to vote; and the vote of the holders of at least two-thirds of the shares of each class or series so affected by the amendment, present or represented at the meeting, shall be necessary to the adoption thereof, except that the articles may provide, with respect to any such class or series, for the vote of a greater or lesser proportion (not less than a majority) of the voting power present or of the total voting power, in which case the vote so provided shall be the necessary vote for such class or series.

The right to seek an involuntary dissolution of a corporation is governed by La. R.S. 12:143, which provides as follows, in pertinent part:

> A. The court may entertain a proceeding for involuntary dissolution under its supervision when it is made to appear that:
>
> (1) The corporate assets are insufficient to pay all just demands for which the corporation is liable, or to afford reasonable security to those who may deal with it; or
>
> (2) The objects of the corporation have wholly failed, or are entirely abandoned, or their accomplishment is impracticable; or
>
> (3) It is beneficial to the interests of the shareholders that the corporation should be liquidated and dissolved; or
>
> (4) The directors are deadlocked in the management of the corporate affairs, and the shareholders are unable to break the deadlock; or

(5) The shareholders are deadlocked in voting power, and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors, but only if irreparable injury to the corporation is being suffered or is threatened by reason thereof, or if irreparable injury to the shareholders is being suffered or is threatened by reason thereof and the court shall determine that such irreparable injury warrants dissolution after giving due regard to the interests of the other shareholders, the employees, and the public; or

(6) The corporation has failed, neglected, or refused, without justifiable cause, to commence business within a period of one year from the date of its incorporation, or, after commencing business, has suspended business for at least one year, and has no real intention of commencing or resuming business; or

(7) The corporation has been guilty of gross and persistent ultra vires acts; or

(8) Judgment has been entered annulling, vacating or forfeiting the corporation's articles and franchise in accordance with the provisions of R.S. 12:163(B); or

(9) (a) A receiver has been appointed under R.S. 12:151 to take charge of the corporation's property, and either (b) there is no reasonable prospect of return of control of the corporation to its shareholders within a reasonable time or (c) the business of the corporation is operating at a loss and there is no reasonable prospect of restoring it to profitable operation within a reasonable time.

B. An involuntary proceeding for dissolution may be instituted against a corporation by either:

(1) A shareholder or shareholders, severally or jointly, who have been registered owners, for a period of not less than six months, of not less than twenty per cent of the entire outstanding shares of the corporation; or

(2) A majority of the corporation's directors; or

(3) A creditor whose claim has been reduced to judgment, on which execution has been issued and returned "nulla bona"; or

(4) A receiver appointed under R.S. 12:151 to take charge of the corporation's property.

ANALYSIS

In support of their exception of no right of action, the defendants rely on the amended Articles of Incorporation of Deca, the language of which they contend clearly preclude plaintiffs from seeking an involuntary dissolution of the company. At the time

of the filing of the Bihms' petition on January 21, 2011, the Second Amended Articles of Incorporation of Deca had been approved by a majority of the vote of the shareholders in compliance with Article VII of Deca's Articles of Incorporation. As noted earlier, that amended Article provides:

> An *action for the involuntary dissolution of the corporation can be brought by any shareholder* or shareholders, severally or jointly, who have been registered owners, for a period of not less than five (5) years *holding not less than fifty one percent (51%)* of the entire outstanding shares of the corporation. (Emphasis added.)

The defendants argue that Mr. Bihm does not own at least 51 percent of the outstanding stock of Deca, nor has he owned at least 51 percent of such stock for a period of longer than five years, as expressly required by Article VII of the second amended Articles of Incorporation of Deca. We agree with the defendants that a clear reading of that Article prohibits Mr. Bihm (not having the requisite shares of stock) from having a right of action to invoke an involuntary dissolution of Deca. The record contains evidence reflecting that Article VII was amended at a November 2, 2010 meeting.

The defendants also submitted documentary evidence of the April 10, 2008 transfer of stock to Mr. Bihm and the amendment of the Articles of Incorporation on that same date. As noted earlier, that amendment provided:

> Whenever the affirmative vote of shareholders is required to authorize or constitute corporate action, *the consent* in writing to such action signed *only by shareholders holding Fifty One (51%) Percent of the total voting power* on the question *shall be sufficient* for that purpose, *without necessity for a meeting of shareholders*. (Emphasis added.)

Relying on the clear language of Deca's amended Articles of Incorporation, the defendants maintain that Mr. Callaway had corporate authority to amend the Articles a second time, in November, without prior notification to Mr. Bihm. Defendants also maintain that Mr. Bihm was present at the transfer of the stock and at the immediate subsequent meeting of the shareholders when that amendment was made, and that *he consented thereto*. That amendment gave Deca shareholders holding 51 percent of the

total voting power the sole power to consent in writing to authorize corporate action without the necessity for a meeting of the shareholders.

Plaintiffs argue that the November 2, 2010 meeting and the second amendment to the Articles of Incorporation are invalid because Mr. Bihm was not given notice of such, as required by La. R.S. 12:31. Plaintiffs further contend that the amendment of the Articles of Incorporation on April 10, 2008 (which gave rise to Mr. Callaway's purported authority to subsequently amend the Articles in November without notification to or consent from Mr. Bihm), is also invalid because insufficient evidence was submitted by the defendants to prove that Mr. Bihm (i.e., two-thirds of the Deca shareholders) was present at the meeting when the amendment was adopted. Notably, Mr. Bihm does not deny being present on April 10, 2008, for the stock transfer and for the shareholders' meeting, or consenting to the amendment of the Articles of Incorporation on that date. Instead, the focus of plaintiffs' argument is that the defendants failed to prove that Mr. Bihm was present at the meeting and consented to the amendment. Based on that argument, plaintiffs maintain the amendments are invalid and that Mr. Bihm, therefore, should have been granted voting power pursuant to La. R.S. 12:31 in the first amendment to the articles -- and since defendants have not proven that he did -- that plaintiffs also have a right of action pursuant to La. R.S. 12:143 to seek dissolution of Deca, notwithstanding the language of Article VII to the contrary.

The statutory grounds for involuntary dissolution of a corporation are limited and specific. Moreover, courts recognize the drastic nature of an involuntary dissolution of a corporation as a remedy and are reluctant to apply it. **Matherne v. Response Instrument Service & Engineering Corp.**, 533 So.2d 1011, 1015 (La. App. 1 Cir. 1988), writ denied, 537 So.2d 1166 (La. 1989). In this matter, Deca's Articles of Incorporation were amended on November 2, 2010, to provide that the involuntary dissolution of Deca can be brought only by a shareholder who has been a registered owner for a period of not less than five years and holding not less that 51 percent of the entire outstanding shares of stock. Only Mr. Callaway meets this requirement. Moreover, Mr. Callaway's action on November 2, 2010, was authorized by the prior amendment to

Deca's Articles of Incorporation on April 10, 2008, which provided a shareholder holding 51 percent of the voting power (again, only Mr. Callaway) with the power to authorize corporate action on behalf of all the shareholders, *without the necessity of a meeting of shareholders.*

In support of the propriety and validity of the amended Articles of Incorporation, the defendants submitted into evidence the certificate of 12 shares of Deca stock transferred to Mr. Bihm from Mr. Callaway on April 10, 2008, signed by Mr. Bihm, and "subject to an agreement between [Deca] and its shareholders effective April 10, 2008." That agreement, also dated April 10, 2008, is signed by both Mr. Callaway and Mr. Bihm. The record also contains the amended Articles of Incorporation, signed April 22, 2008, stating that the resolution amending said Articles was duly adopted pursuant to La. R.S. 12:31 "*at a meeting held on the 10th of April, 2008.*" (Emphasis added.) Additionally, Mr. Callaway has always contended, as reflected by the documentary evidence, that Mr. Bihm was both present at, and consented to, the action taken at the meeting on April 10, 2008.

In light of the foregoing documentary evidence in the record, we can not agree with the plaintiffs that the defendants failed to prove that the amended Articles were valid. This evidence, at least circumstantially, reveals that Mr. Bihm was indeed present on April 10, 2008, and that he did not object to the corporate actions taken that day. Moreover, the amendments clearly authorized Mr. Callaway, singularly, and without the necessity of a meeting of shareholders, to subsequently amend the Articles on November 2, 2010, rendering himself as the only shareholder with the authority to involuntarily dissolve the corporation. The Bihms failed to present any evidence to the contrary.

We also find no merit to plaintiffs' argument that the permissive grounds set forth in La. R.S. 12:143 B, for seeking an involuntary dissolution, espouse some type of legislative public policy that allows this drastic remedy in certain situations notwithstanding any Articles of Incorporation to the contrary. Plaintiffs do not cite, nor has this court found, any authority for such a proposition. Instead, this court is

constrained to follow the statutory general authority vested in corporations pursuant to La. R.S. 12:31, allowing a corporation to amend its articles in any respect, as long as authorized by its own articles.

Therefore, because no evidence was presented by the plaintiffs to rebut the proof that Mr. Bihm was both, present at the April 10, 2008 meeting, and consented to the amended Articles of Incorporation (and, also, in light of the fact that the remedy is drastic and reluctantly granted), the evidence in the record and the clear language of Deca's Articles of Incorporation reveal that plaintiffs have no right of action to seek the involuntary dissolution of Deca. Therefore, the trial court did not err in granting the defendants' exception of no right of action and dismissing the plaintiffs' claims herein.[1]

ANSWER TO THE APPEAL – NO CAUSE OF ACTION

The defendants answered the appeal, assigning as error the trial court's denial of their exception of no cause of action. At the hearing in the appeal of this matter, the defendants acknowledged that if this court were to affirm the grant of the no right of action, the exception of no cause of action is moot, since there are no remaining parties seeking the remedy sought by the Bihms. They asserted that the answer was filed in the alternative, should this court reverse and deny the exception of no right of action. Because we have found the trial court did not err, and we affirm the granting of the exception and the dismissal of plaintiffs' claims, the defendants' answer is indeed moot. However, we simply note that the exception of no cause of action was properly denied by the trial court. Unlike the exception of no right of action, evidence can not be received or considered in determining the exception of no cause of action. Such exception must be decided pursuant to the four corners of the petition, with all allegations being accepted as true. As such, *if and only if* the Bihms had a right of action, we find that, on the face of

[1] In light of our conclusion that Mr. Bihm has no right of action, it follows that Ms. Bihm also has no right of action. However, we also agree with the trial court's separate conclusion that Ms. Bihm has no right of action, irrespective of Mr. Bihm's right, to seek dissolution of the corporation, since any community property rights that she may have accrued in her husband's shares of stock do not materialize if and until the community ceases to exist.

the petition, a cause of action has been plead. Therefore, the trial court did not err in denying said exception.

CONCLUSION

For all the foregoing reasons, we find the exception of no right of action was properly granted, and accordingly, affirm that judgment dismissing the plaintiffs' claims with prejudice. All costs of this appeal are assessed to the plaintiffs.

AFFIRMED.