IN THE UTAH COURT OF APPEALS

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| Diamond T. Developments, Inc., Plaintiff and Appellant, v. David R. Brown, Chris Loock, and Chad Stokes, Defendant and Appellees. | ) | MEMORANDUM DECISION (Not For Official Publication) Case No. 20070397-CA F I L E D (November 28, 2008) 2008 UT App 435 |

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Second District, Ogden Department, 020908133
The Honorable Parley R. Baldwin

Attorneys: M. Darin Hammond, Ogden, for Appellant
Scott L. Wiggins, Salt Lake City, for Appellees

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Before Judges Bench, Billings, and McHugh.

BENCH, Judge:

Diamond T. Developments, Inc. (Diamond) appeals the trial court's order of dismissal and denial of Diamond's motion for summary judgment in which the court ruled that "[Diamond] has been dissolved and has no statutory right to bring this action against Defendants." It is undisputed that Diamond was involuntarily dissolved as a corporation in 1979.

"A corporation is an artificial being . . . existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . ." CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987) (internal quotation marks omitted). Under the statutory scheme in place at the time of Diamond's involuntary dissolution, Utah law permitted dissolved corporations to exist past dissolution for only limited purposes. See Utah Code Ann. § 16-10-100 to -101 (1973) (repealed 1992). "The dissolution of a corporation . . . shall not take away or impair any remedy available to or against the corporation . . . for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of . . . dissolution." Id. § 16-10-100. Further, a dissolved corporation may "continue for the

purpose of winding up its affairs . . . and to effect such purpose such corporation may sell or otherwise dispose of such property and assets, sue and be sued, contract, and exercise all other incidental and necessary powers." Id. § 16-10-101 (emphasis added).

Generally, a dissolved corporation's winding up includes:

> (1) collecting its assets; (2) disposing of its properties that will not be distributed in kind to its shareholders; (3) discharging or making provision for discharging its liabilities; (4) distributing its remaining property among its shareholders according to their interests; [and] (5) doing every other act necessary to wind up and liquidate its business and affairs.

Jennifer L. Berger & Carol A. Jones, Fletcher Cyc Corp § 8158 (Perm. ed. 2003); see also 19 Am. Jur. 2d Corporations § 2422 (2004) (explaining that a corporation may continue to exist following dissolution to effect winding up). In Salt Lake Investment Co. v. Wilford H. Hansen Stone Quarries, Inc., 927 P.2d 200 (Utah Ct. App. 1996), this court refused to permit a corporation that had been dissolved for thirty years to maintain its quiet title action because the dissolved corporation's winding-up period was over. See id. at 201-02. The court noted that the dissolved corporation's actions as outlined in its articles of dissolution constituted a "textbook winding-up process." Id. at 201. Those activities included the paying of debts and obligations; distributing property and assets among the shareholders; and making provision for the payment of debts, obligations, and other liabilities still pending against the corporation. See id.

Here, Diamond concedes that this claim did not arise prior to its involuntary dissolution. Utah case law, including Holman v. Callister, Duncan & Nebeker, 905 P.2d 895 (Utah Ct. App. 1995),[1] and the applicable dissolution statutes confirm that Diamond ceased to exist as a going concern at the moment of its

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[1]Holman v. Callister, Duncan & Nebeker, 905 P.2d 895 (Utah Ct. App. 1995), states that a corporation ceases to exist at dissolution. See id. at 897. We are not persuaded by Diamond's argument that Holman is distinguishable and that Falconero Enterprise, Inc. v. Valley Investment Co., 16 Utah 2d 77, 395 P.2d 915 (1964), mandates a different result. Falconero is so devoid of factual context and analysis that it provides very little precedential value, and a close reading of Holman does not bear out the narrow holding Diamond suggests.

dissolution. Post-dissolution Diamond was statutorily permitted to pursue only claims that arose prior to its dissolution--and then only if the action was commenced within two years of dissolution. Diamond is therefore not statutorily empowered to sue Defendants unless this suit qualifies as winding up.

There is no tenable argument before us that Diamond's suit and desire to perform on the 1972 contract can be classified as the winding up of its affairs. Indeed, the instant suit and any subsequent performance would, under the statutes by which Diamond was dissolved, constitute impermissible new business. We agree with the trial court that Diamond has no statutory right as a corporation to bring suit to have the tax sale invalidated.[2]

We therefore affirm the decision of the trial court.

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Russell W. Bench, Judge

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WE CONCUR:

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Judith M. Billings, Judge

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Carolyn B. McHugh, Judge

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[2]In its opening brief, Diamond alternatively suggested that the contractual right at the center of this controversy should be deemed to have transferred to the principals of the corporation. After Defendants objected in their responsive brief, Diamond conceded that this alternative argument was not preserved below and therefore not properly before us on appeal. See Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶ 14, 48 P.3d 968 (stating that issues not preserved at the trial court are not properly before the appellate court (citing Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998)).