Pittstown Beagle Club v. Hale Mountain Fish & Game Club, Inc., No. 302-9-03 Bncv (Wesley, J., June 8, 2006)

STATE OF VERMONT
BENNINGTON COUNTY, SS.

BENNINGTON SUPERIOR COURT
DOCKET NO. 302-9-03 Bncv

PITTSTOWN BEAGLE CLUB)
)
VS.)
)
HALE MOUNTAIN FISH &)
GAME CLUB, INC.

OPINION & ORDER

The bench trial to determine the merits of this matter began on December 8, 2005, and the evidence was concluded on May 9, 2006. Plaintiff was represented by Sigismund Wysolmerski, Esq. and Karl Anderson, Esq. Defendant was represented by Alan Biederman, Esq. Shortly before the commencement of trial, Defendant filed a motion to dismiss challenging Plaintiff's standing as to Counts 1 & 3 of its complaint, and its failure to state a claim upon which relief could be granted as to Count 2. When the evidence could not be concluded after the first day of trial, the Court required Plaintiff to respond to the motion. Eventually determining that justice required a complete evidentiary record, the Court by its entry dated March 10, 2006 ordered the trial to go forward. Although given leave until May 31 to supplement previously filed requests to find and memoranda of law, neither party has made additional filings.

As set forth below, for reasons substantially as argued in support of Defendant's motion to dismiss, the Court concludes that Plaintiff has failed to establish standing to sue with respect to its challenges in Counts 1 and 3 to Defendant's actions proceeding from its governance decisions, and that Plaintiff has failed to prove that there is any separate contractual right under which it may recover its claim for damages against Defendant.

Factual Background

Hale Mountain owns a large tract of land approximating 230 acres on Rod and Gun Club Road in Shaftsbury. Hale Mountain is a duly incorporated Vermont not-for-profit corporation which has conducted sporting activities on its property since the late 1940s. Plaintiff is an unincorporated association; however, it has historical ties to a separate New York not-for-profit corporation with the same or similar name. The two Pittstown Beagle organizations, which enjoyed a significant overlap in memberships at the time of the original contact with Hale Mountain, promote the sporting activities associated with raising and running purebred beagle dogs.

In 1977, representatives from the New York organization approached Hale Mountain about using the Shaftsbury property for "beagling" activities, including the sponsorship of annual trials to be sanctioned by the American Kennel Club. All interested parties were satisfied with the results of these negotiations, and for the next 25 years a significant portion of Hale Mountain's membership has pursued beagling at the Shaftsbury property, after the club made considerable alterations to the property to accommodate such activities. Nonetheless, the agreement reached in 1977 was decidedly informal, especially as regards the preservation of any identifiable separate party who might assert enforceable rights pursuant to the understanding, contractual or otherwise.

As Defendant insists, there was no merger between the New York organization and Hale Mountain, a legal conclusion that Plaintiff does not dispute. Indeed, the New York corporation persisted after the 1977, retaining its existence, business purpose and activities quite separate from Hale Mountain, or the more narrowly focused interests of those claiming membership in the so-called "subcommittee" of Hale Mountain known as the Pittstown Beagle Club. This denomination stems from the only document that expressed the 1977 understanding, stating:

> A sub-committee of Hale Mountain members are proposing a 60+ acre fenced running area for the training of A.K.C. Beagles to meet any and all state and local zoning laws. This committee will finance the total bill for all costs of the fenced

> area and the maintenance of the area. The committee hopes to make annual donations to Hale Mountain's treasury. Any member of Hale Mountain may use the fenced training area in accordance with A.B.C. regulations and Hale Mountain rules.

As described by Monty Bushee, who was Hale Mountain's president at the time, the agreement created what might be called "a club within a club". Although there are no other corporate records except the above-referenced memorandum of the understanding, the proposal was first approved by Hale Mountain's board and then its membership, all as established by Bushee's testimony.

Importantly, as regards its relationship with Hale Mountain, Pittstown Beagle Club did not maintain a separate identifiable interest, either to be held by the New York organization or by a distinctive unincorporated Vermont entity. Rather, as reflected by the original document, it submerged its associational interests with those of Hale Mountain, the owner of the property it sought to use. As Bushee confirmed, Pittstown got no rights by deed or lease. Instead, its members who wanted to use Hale Mountain's premises agreed to "become members of the club and follow its rules."

As with the description of the organizational structure, the reference in the original memorandum regarding finances was never elaborated more formally. By common understanding, the Pittstown Beagle subcommittee of Hale Mountain raised the funds to support its activities largely independently of other considerations for Hale Mountain's budget. Although Hale Mountain advanced the money necessary to build the first of two penned-in areas for running beagles, Pittstown members made substantial commitments of capital and volunteer labor to erect the fences, eventually replenishing the Hale Mountain treasury. The first pen was built in 1978 and the second within the next ten years, or so. In consideration of deterioration and wear-and-tear, Pittstown has substantially replaced the first of these pens, and undertaken significant maintenance and repair to the second. The subcommittee regularly sponsored AKC events which brought money into its accounts in most years. To the extent revenues for these

events exceeded costs, the subcommittee turned over the net proceeds to the Hale Mountain treasurer for use in meeting the parent club's general obligations.

Beginning in 1999, dissension began to emerge within the ranks of the Hale Mountain membership divided generally along lines defined by primary sporting interest: the "shooters", who were devotees of trap shooting and other gun-related activities, versus the "beaglers", who retained affiliation with Hale Mountain in order to participate in Pittstown activities. Shifts in board membership between shooters and beaglers began to assume importance, as did the activities most favored by whomever held Hale Mountain's presidency. Prior to the annual meeting in 1999, it was suspected that a motion would be offered to expel Pittstown from Hale Mountain and discontinue beagling activities on the club property. However, the beaglers turned out the vote and captured the presidency, temporarily quelling the calls for expulsion.

Subsequent changes in Hale Mountain's democratic demographics made that victory short-lived. In 2003 then president James Logan circulated a statement of "General Information" suggesting systematic re-evaluation of the organizational structures of Hale Mountain in regard to its relationship with Pittstown. On Sept. 4, 2003, at a meeting of the Hale Mountain Board, the directors expressed general agreement as to a proposal to clarify the relationships implicated by "the club-within-the-club". At that meeting, however, no agreement could be reached as to the duration of the proposed memorandum of understanding, and the discussion was put off until the special membership meeting to be held on Sept. 23, 2003.

The issue was warned as a discussion of "an unfinished item in the draft agreement," but during the discussion a motion from the floor was raised to expel Pittstown and cease all beagling activities. The chair ruled that he would consider any vote "advisory only", since such a determination properly came within the province of the board. The vote was taken and the advisory vote in favor of the resolution was recorded as 42 - 25. At a meeting of the Board on Sept. 29, the Board voted 9 - 2 to terminate its association with Pittstown. A subsequent motion to require the removal of the fences associated with the pens within 30 days was tabled. On

February 4, 2004, at a meeting of the Hale Mountain membership, Board Chair James Logan moved to expel all Pittstown Beagle members, a motion which carried 48 - 13. The minutes record that the action would be subject to "the Board having the final vote after each member be expelled is heard" (sic). Letters of expulsion were sent to those identified as Pittstown members. However, in addition to the notice of the right to be heard on the expulsion, Pittstown members were subsequently sent dues renewal notices offering reinstatement, which several accepted.

Following the actions by the membership and board in Sept. 2003, Pittstown sought injunctive and declaratory relief by the filing of this lawsuit on Sept. 29, 2003. That complaint was dismissed for failure to state a claim by Judge Carroll's entry of Jan. 14, 2004. Plaintiff moved for reconsideration and to amend its claims, adding Counts 2 and 3, and Judge Carroll granted leave to amend by her entry on April 5, 2004, ruling that the initial complaint had lacked "sufficient detail nor substance for the Court to determine what action was being complained of", but that the amendments had adequately clarified statements of Plaintiff's causes of action.

Discussion

Despite the anguished entreaties to right injustice that reverberate throughout its pleadings, Plaintiff has struggled to find a legal framework within which it might compellingly state a claim. On the one hand, suggesting it has some source for its existence outside the scope of Hale Mountain's by-laws, Pittstown attempts in Count 2 to posit a breach of contract claim, and in Count 3 to claim a proprietary interest in aspects of Hale Mountain's revenues to which a conversion claim might properly attach. On the other hand, acknowledging its organizational stature as an unincorporated sub-committee of Hale Mountain, and claiming that the parent corporation acted outside its lawful authority, in Counts 1 and 3 Plaintiff brings a direct challenge to the votes of the Hale Mountain board by which Pittstown was discontinued as a sub-committee and its members provisionally expelled. As discussed below, most of these claims were unsupported in law as framed by the complaint, and became convincingly demolished by the evidence.

Contract Claims - Plaintiff's contract claim stems from ¶29 of its complaint, in which it refers to the memorandum setting forth the expectations for the association between Hale Mountain and the Pittstown Beagle Club, stating: "[t]his contract anticipated an agreement in perpetuity between the parties, the former Pittstown Beagle Club, Inc. a New York state non-profit organization and Hale Mountain Fish and Game Club, Inc., a Vermont corporation." This appears to suggest that Pittstown Beagle Club, Inc. was a party to a contract with Hale Mountain, and that Plaintiff is asserting rights under such a contract. Neither proposition holds up as a matter of pleading, law or fact.

In its amended complaint in ¶1, Plaintiff describes itself as "an unincorporated association of individuals who by nature of their interest in running of Beagles conduct this business in and around the County of Bennington, Vermont" (sic). Later in ¶ 29, it more specifically states that it is "a recognized sub committee or standing committee of Hale Mountain". Pittstown Beagle Club, Inc., the New York corporation, has never been a party to this lawsuit. It was not a party to any contractual agreement with Hale Mountain, and even if it had been, Plaintiff has failed to demonstrate its standing to assert such corporation's rights.[1] Plaintiff established no evidence to support the claim that it has some continuing recognizable identity derived from being "the former Pittstown Beagle Club, Inc. a New York state non-profit organization". Indeed, it appears undisputed that the New York corporation is still in existence but has no involvement with Hale Mountain.

Doubtless with hindsight now reaching back almost 30 years, there are current Pittstown members who wish the arrangement had been structured differently. Yet, the simple four sentence memorandum drafted in 1977 quite clearly creates no enforceable rights in any party with an

[1] 1. In ¶ 3 of the amended complaint, Plaintiff alleges that on August 6, 1979 a "merger" of Hale Mountain, Inc. and Pittstown Beagle Club, Inc. took place. The evidence completely contradicts this claim, as it is apparent that the New York corporation presently maintains a separate existence. In any event, Plaintiff has failed to establish either facts or law to demonstrate how it can claim standing to assert rights purportedly created as a result of such "merger".

organizational identity separate from Hale Mountain.[2] It surely is not "an agreement in perpetuity", nor does it have even the necessary pre-requisites for a long-term lease. Most significantly, the memorandum by its terms purports only to memorialize a matter of internal governance made by Hale Mountain at the time, by which a sub-committee to be known as Pittstown Beagle Club was organized to promote beagling activities upon the understanding that it would be financially self-sufficient. It does not recognize Pittstown as a separate contracting party, either in the form of the New York corporation or in any other separately identifiable aggregation. In sum, the complaint cannot be read even to state a claim for any breach of contract between Hale Mountain and the organization Plaintiff purports to represent, and the facts demonstrate that no contract involving the maintenance of beagling pens ever came into being between Hale Mountain and *any* separate party. [3]

Conversion Claim - In its second amended complaint at ¶42 of Count 3, Plaintiff alleges in connection with its assertion that Defendant expelled individual members that "[t]he Logan faction...illegally appropriated and converted to its own use the treasury of Hale Mountain Fish

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[2] 2. As Hale Mountain argues, Pittstown's contract claim as formulated in ¶29 appears to sound primarily in the assertion that it somehow became vested with rights created by a predecessor "the former Pittstown Beagle Club, Inc."which it had standing to enforce as an entity separate from Hale Mountain, rather than in its capacity as a sub-committee of Hale Mountain. Plaintiff's standing as a sub-committee to assert a claim for breach of contract against its parent corporation would be even more problematic, assuming the complaint could be read to state such a claim. As Defendant points out, a significant obstacle to such a claim is the logical inconsistency of a corporation suing itself claiming it was violating contractual duties it owed to itself. Furthermore, as discussed below, any attempt by Pittstown to reframe the issue to maintain that the termination of its activities by Hale Mountain was *ultra vires* runs afoul of statutory limitations on the right of members to bring actions against a non-profit corporation.

[3] 3. Hale Mountain relies on the alternative defense that Pittstown could not prove damages, even had it been able to establish an enforceable right in contract. This contention arises from a separate lawsuit by which the Environmental Board concluded that Pittstown's construction of the fenced pens on Hale Mountain's property amounted to development which necessitated an Act 250 permit, for which neither Hale Mountain, nor its Pittstown subcommittee ever applied. *In re: Hale Mountain Fish and Game Club, Inc.* Declaratory Ruling #435(Opinion&Order, Aug.4, 2004). This matter is now on appeal, the Supreme Court having denied appellee's motion to dismiss, *In re: Hale Mountain Fish and Game Club, Inc.* 2006 VT 34 (4/28/2006). Hale Mountain convincingly argues that until it is finally determined whether the pens must be removed by reason of the lack of a permit, any claim for damages based on a contractual right to maintain and use them would have failed as speculative, even had there been proof of a contract. See *Killington, Ltd. v. State*, 164 Vt. 253, 258 (1995)(determination of economic injury to property would require court to improperly speculate as to how land might have been used based on applications for permits not yet filed, and regulatory proceedings not yet concluded).

and Game Club which treasury is the property of all members of the club." To establish a claim for conversion, a party must prove as an essential element that it is *the owner* of the allegedly converted property. *P.F. Jurgs & Co. v. O'Brien*, 160 Vt. 294, 299 (1993). Further, it must prove that "another has appropriated the property to that party's own use and beneficial enjoyment, has exercised dominion over it in exclusion and defiance of the owner's right, or has withheld possession from the owner under a claim of title inconsistent with the owner's title." *Id.*

As Defendant insists, Plaintiff cannot establish any ownership interest in funds properly paid into Hale Mountain's treasury and therefore it has no basis for a claim of conversion. Pursuant to 11B V.S.A.§3.02(4), the Legislature has established the right of a non-profit corporation to hold personal property and deal with its own funds. Yet there is no statutory right by which members may assert a claim against such funds. See, 11. V.S.A. §6.20 *et seq*. generally describing the rights of members. Since Pittstown had no property interest in any aspect of the funds dedicated to Hale Mountain's treasury, Hale Mountain cannot be said to have illegally exercised dominion over any such funds in a manner inconsistent with Pittstown's title, and the claim for conversion must fail.

Claims of *Ultra Vires* - As an alternative basis for relief, and presumably in reliance on its status as a sub-committee of Hale Mountain, and the fact that its members are also members of Hale Mountain, Plaintiff challenges the validity of Defendant's actions based on the terms of its own governing documents. The Court had originally dismissed the complaint based on its conclusion that no cause of action could be made out since the basis for Plaintiff's contention that Defendant had caused it injury was not apparent. Thereafter, Plaintiff twice amended its complaint to state the claims of contract and conversion discussed above; in addition, the amended complaint alleges that Defendant, or its Board, has violated its own by-laws, first by voting to expel the standing committee known as Pittstown Beagle Club, and then by voting to expel all those individual members who were identified with Pittstown Beagle Club. Thus, ¶23 states "the Directors have violated the by-laws of the Hale Mountain Fish and Game Club by

voting to expel the standing committee without warning the same...". By ¶24, Plaintiff further alleges that Defendant's bylaws do "not confer any authority upon the directors to amend or delete any part or portion of the bylaws without a duly warned meeting." In ¶40 & 41, the complaint states that by voting to expel individual members, the Board acted "in direct contravention of the ...By-laws in effect at the time" including those governing the "discipline of members". Defendant challenges Plaintiff's standing to assert each of these claims.

The Vermont Nonprofit Corporation Act 11B V.S.A.§1.01 *et seq.* specifically allows only certain persons to challenge the actions of a corporation as being beyond its powers to act. In general, under §3.03 governing "Ultra Vires", "the validity of corporate action may *not* be challenged on the ground that the corporation lacks or lacked the power to act." §3.03(a)(*emphasis added*). Subsections (b) & (c) recognize only limited exceptions to enable such challenges, and only subsection (b) arguably applies to the circumstances here: "A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought *by the attorney general, a director, or by a member or members in a derivative proceeding" (emphasis added).* Since this action was commenced neither by the attorney general, nor by one claiming to be a director of Hale Mountain, Plaintiff's only claim to standing must rest on its ability to demonstrate that its cause of action qualifies as "a derivative proceeding". Plainly, it does not.

"Derivative suits" are defined by 11B V.S.A. §6.40. Under limited circumstances, they may be instituted by any director, or by the lesser of 50 members or that number of members having at least 5% of the voting power, "in the right of a domestic or foreign corporation to produce a judgment in its favor." §6.40(a). By what the Supreme Court refers to as "well-settled" principles, a derivative suit is one in which "a shareholder sues on behalf of the corporation for harm done to the corporation." *Bovee v. Lyndonville Savings Bank & Trust, Co.*, 174 Vt. 507 (2002). By statutory requirement, before such a suit can be brought, the claims "must be verified and allege with particularity the demand made, if any, to obtain action by the directors and either

why the complainants could not obtain the action or why they did not make the demand." §6.40(c). In this case, Plaintiff has made no attempt to style its complaint as a derivative action, as it neither sought to sue on behalf of Hale Mountain, nor plead in a manner consistent with the requirements of bringing a derivative action. Rather, Plaintiff has brought a direct attack against Hale Mountain based on the claimed failures by its officers to comply with its by-laws. Yet, this is precisely the type of challenge that 11B V.S.A.§3.03 was designed to preempt. Plaintiff has no standing to challenge Defendant's actions as *ultra vires* on the claim that they violated internal governance protocols .[4]

Conclusion

As Judge Carroll observed in her order dismissing the complaint as originally plead, "Courts are reluctant to interfere with the affairs of a corporation on behalf of a minority of the stockholders." *Gordon v. Business Men's Racing Ass'n*, 141 La. 819, 75 So. 735 (1917). This case boils down to the complaints of an active group of members in a long-standing sporting organization who no longer command the majority view as to what the future goals of the organization ought to be. It provides a classic example of a terrain into which a court ought to proceed warily before blundering about making mischief -- most especially because there is a clear statutory imperative to resist the invitation to interfere. The die was long ago cast determining the outcome in this matter when the interested Pittstown members either optimistically elected to join Hale Mountain in the belief that common goals would long be respected, or did so however reluctantly because becoming subsumed as a committee was the only pathway into an agreement with Hale Mountain to use its property for beagling. In any event, neither facts nor law support the creation at that time of any perpetual dedication of the land to beagling pursuits. Rather, Pittstown became a committee of Hale Mountain, and its long-term

[4] 4. As Defendant notes, this Court has previously dismissed a related claim by which certain of Plaintiff's members sought to remove directors of Hale Mountain. Under 11 V.S.A.§8.10, the statute on which plaintiffs relied in that action, the Court concluded they lacked standing as falling outside the limited classes of persons recognized as having the authority to bring such challenges. *Miller et al v. Stewart et al*, Doc No. 261 -7-04 BnC (Entry, 9/28/04).

interests relative to the use of Hale Mountain's property became subject to the statutory democratic process by which non-profit organizations are governed. As Plaintiff in this action, Pittstown has demonstrated no basis by which the Court has any lawful authority to review its grievances as to the outcome of that process.

JUDGMENT ORDER

WHEREFORE, it is hereby ORDERED: Judgment is **ENTERED** for Defendant as to all counts, and the complaint is **DISMISSED.**

DATED June 8, 2006, at Bennington, Vermont.

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John P. Wesley
Presiding Judge