

IN THE COURT OF APPEALS OF IOWA

FILED
AUG 26 1980 **426**
CLERK SUPREME COURT

C. LYNN MELHADO,

)

Plaintiff-Appellee,

)

Filed August 26, 1980

vs.

)

BERNARD R. MILLER,

)

.. 0-119
2-63661

Defendant-Appellant.

)

Appeal from Polk District Court - Ray Hanrahan, Judge.

Defendant appeals trial court's order directing a writ of mandamus issue requiring him to transfer shares of corporate stock to plaintiff in compliance with an option contract. **AFFIRMED.**

Joseph L. Marks of Marks, Marks & Marks, Des Moines, Iowa, for defendant-appellant.

John D. Hudson of Carney, Hudson & Williams, Des Moines, Iowa, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Snell, Carter and Johnson, JJ. Donielson, J. takes no part.

Defendant, Bernard R. Miller, appeals trial court's order directing a writ of mandamus issue requiring him to transfer 500 shares of corporate stock in the Learning Post, Ltd., to plaintiff, C. Lynn Melhado, in compliance with an option contract. He asserts trial court erred in issuing the writ because 1) Article V, section 3, of the corporation's by-laws prohibits him from transferring the stock, 2) he was not the real party in interest where trial court's action invalidated a corporate by-law, and 3) mandamus is not the proper remedy to enforce an option to purchase common stock of the corporation. We affirm.

Prior to February 28, 1977, plaintiff and defendant promoted and organized a business wherein each was to acquire an equal number of shares of stock to be issued by the corporation. On February 28, 1977, plaintiff and defendant jointly incorporated the Learning Post, Ltd., and adopted its by-laws under Iowa law. See ch. 496A, The Code 1977. Pursuant to the articles of incorporation, plaintiff was named a director and vice-president; defendant, a director, president, and treasurer; and Darlene Joyce Miller, secretary. A form of stock certificate was adopted and 1,000 shares of stock were issued to defendant at a par value of \$10 per share. Plaintiff purchased no shares. On March 29, 1977, the parties executed an agreement whereby defendant purchased plaintiff's rights, title and interest in the corporation. The terms of the agreement provided plaintiff would have the right to purchase 50% of defendant's stock within a period commencing 18 months after opening of a retail store by the corporation and ending 24 months thereafter. A retail store was opened April 30, 1977.

Subsequently, plaintiff and defendant developed differences. By the end of September 1977, conditions between the parties had become so strained plaintiff tendered her resignation as a director and officer of the corporation. On December 30, 1977, plaintiff's resignation was accepted and new directors and officers of the corporation were elected.

Plaintiff, on October 12, 1978, brought an action for declaratory and supplemental relief to have her rights under the March 29, 1977 agreement determined. Defendant answered on November 17, 1978. Upon submission, trial court entered its findings of fact and conclusions of law on February 6, 1979. On February 16, 1979, trial court decided plaintiff had an option to purchase 50% of defendant's stock during the period between eighteen and twenty-four months after April 30, 1977. Trial court further

ordered defendant grant plaintiff the right to examine the books, records, tax returns, and any other document of the Learning Post, Ltd. to enable her to decide whether or not to exercise her option. The court reserved jurisdiction to award any appropriate supplementary relief in accordance with Iowa R. Civ. P. 266. On February 26, 1979, defendant filed a motion for new trial and stay order, alleging inter alia, 1) the court had no jurisdiction over the corporation, the real party in interest, and could not grant plaintiff the right to examine the books, records, tax returns and documents, and 2) the March 29, 1977 agreement between the parties was without consideration or was subsequently terminated by the parties. Trial court overruled defendant's motion on March 12, 1979.

After defendant repeatedly denied plaintiff access to examine various books, records, tax returns, and other documents of the Learning Post, Ltd., plaintiff, on March 20, 1979, made application to trial court for a protective order compelling production of the aforementioned items. Trial court granted plaintiff's request on March 26, 1979, based on plaintiff's status as a director of the corporation at the time the agreement was executed, the validity of the agreement, and defendant's duty to furnish the records. On April 10, 1979, plaintiff tendered to defendant by certified mail a cashier's check for \$5,000, notifying him of her intent to exercise her rights to purchase 50% of his stock as provided by the March 29, 1977 option agreement, and demanding transfer of this stock. After defendant refused to comply, plaintiff, on April 17, 1979, requested trial court issue a writ of mandamus compelling defendant to take all appropriate steps to transfer the 500 shares of stock to plaintiff. Defendant answered on April 26, 1979, asserting Article V, section 3 of the Learning Post's by-laws prohibited him from transferring the stock because he was not the real party in interest. Trial court disagreed with defendant and, on May 9, 1979, ordered defendant take all steps necessary to transfer his 500 shares to plaintiff. Defendant filed notice of appeal from this order on May 11, 1979.

I. Appellate Jurisdiction. We initially must determine the issues properly before this court for review. Appeals to this court are regulated by definite time frames for filing. Iowa R. App. P. 5. A party must file an appeal within, and not after, thirty days from entry of the final order, judgment, or decree, unless a motion for new trial has been properly filed, and then within thirty days after entry of the ruling on such motion. Id. In any case, there may be, and often are, two final rulings, judgments, or decrees which would activate running of the period for filing an appeal, one putting

the cause beyond the power of the court to place the parties in their original position with regard to a specific issue, the other adjudicating the remaining issues of the case. Green v. Advance Homes, Inc., 293 N.W.2d 204, 207 (Iowa 1980); Lyon v. Willie, 288 N.W.2d 884, 886 (Iowa 1980); Fenchel v. Fenchel, 268 N.W.2d 297, 299 (Iowa 1978).

Examination of the record reveals trial court entered an order on February 16, 1979, adjudicating plaintiff's right to purchase 50% of defendant's stock during a period between eighteen and twenty-four months after April 30, 1977. Defendant, on February 26, 1979, filed a motion for new trial after entry of trial court's February 16, 1979 order. Trial court overruled that motion on March 12, 1979, but defendant filed no notice of appeal until May 11, 1979, following trial court's ruling on plaintiff's petition for writ of mandamus on May 9, 1979. We therefore limit our review to the propriety of trial court's issuance of the writ of mandamus in favor of plaintiff as we lack subject matter jurisdiction of any issues determined by the February 16, 1979 order. See Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 554 (Iowa 1980). Although appellee contends appellant's brief fails to address the impropriety of mandamus, we believe the substance of appellant's argument focuses on this issue.

II. Scope of Review. A mandamus action is in equity. Chicago, Burlington, & Quincy Railroad v. Iowa State Tax Commission, 259 Iowa 178, 180, 142 N.W.2d 407, 408 (1966). Our review consequently is *de novo*. Schrader v. State, 213 N.W.2d 539, 540 (Iowa 1973); Chicago B. & Q. R.R., 259 Iowa at 180, 142 N.W.2d at 408. While we will give weight to trial court's fact-findings, we are not bound by them. Schrader, 213 N.W.2d at 540. We will focus our review on a determination of trial court's proper exercise of discretion. See Roach v. Churchman, 457 F.2d 1101, 1105 (8th Cir. 1972).

III. Issuance of Writ of Mandamus. Section 661.1, The Code 1979, provides: "The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station." Mandamus is a summary and extraordinary writ. Reed v. Gaylord, 216 N.W.2d 327, 332 (Iowa 1974). In order to be available, the rights and duties of the parties must be clear and there must be no other speedy and adequate remedy in the ordinary course of the law. Id. Mandamus may be precluded where another remedy is sufficient to afford relief on the very subject matter in question and is equally convenient, beneficial, and effectual. Virginia Manor, Inc. v. City of Sioux City, 261 N.W.2d 510, 514-15 (Iowa 1978).

The purpose of a writ of mandamus is to require action to enforce and establish a right and to enforce a corresponding duty imposed by law. Schwarz Farm Corp. v. Board of Supervisors, 196 N.W.2d 571, 575 (Iowa 1972). Essential prerequisites for an action seeking mandamus include: 1) duty enjoined by law upon defendant, in performance of which, plaintiff has a personal interest; 2) breach or non-performance of such duty by defendant; 3) legal right in plaintiff to damages because of such non-performance; and 4) absence of any other adequate remedy in the ordinary course of law. Charles Gabus Ford, Inc. v. Iowa State Highway Commission, 224 N.W.2d 639, 644 (Iowa 1974). Defendant does not allege trial court erred in determining plaintiff met the foregoing criteria, but rather asserts 1) Article V, section 3, of the corporation's by-laws requires the corporation be given first opportunity to purchase the shares, 2) he was not the real party in interest since trial court's action invalidated a corporate by-law, and 3) mandamus is not the proper remedy to enforce an option to purchase the common stock of a corporation. We, however, find these contentions without merit.

Generally, restraints on the power to transfer shares of stock are regarded with disfavor and must be strictly construed. Carlson v. Ringgold County Mutual Telephone Co., 252 Iowa 748, 760, 108 N.W.2d 478, 485 (1961). Restrictions in the corporation's by-laws regulating transfer of shares will be authorized only if reasonable. Id. Nor can they be made available to defeat the rights of third persons. Farmers' and Merchants' Bank of Lineville v. Wasson, 48 Iowa 336, 339 (1878).

Despite these requisites, restrictions on the sale of corporate stock apply only to voluntary sales, not to transfers by operation of law. McDonald v. Farley and Loetscher Mfg. Co., 226 Iowa 53, 57, 283 N.W. 261, 263 (1939). Requirements on stockholders to give the corporation an opportunity to purchase before selling to outsiders are generally valid. Id. at 56, 283 N.W. at 263. "The reason often given for approving such restrictions on the alienability of stock is that the personal element is important in the management of a corporation and they serve to protect it from acquisition of shares of its stock by persons who would use it against the interest of the company." Id. at 56, 283 N.W. at 263. Stockholders who organize a corporation must have the right to protect themselves against invasion by parties who buy stock mainly for the purpose of "boring from within." Mason v. Mallard Telephone Co., 213 Iowa 1076, 1087, 240 N.W. 671, 675 (1932).

In reviewing the option contract providing plaintiff the opportunity to purchase 50% of defendant's stock in the corporation, we must evaluate the parties' intentions as

they appeared when the agreement was executed. We note plaintiff was not only an organizer of the corporation, but also both a director and an officer of the corporation. In light of the evidence presented, we cannot speculate plaintiff had any desire other than the corporation's success. Consequently, we find none of the foregoing considerations restricting alienability of the stock to plaintiff are present and conclude Article V, section 3 of the corporation's by-laws inapplicable.

In light of the foregoing determination, defendant's contention he is not the real party in interest also must fail. Defendant is the sole shareholder of the corporation's stock and the only party contracted to plaintiff to transfer 50% of the corporation's stock. Since there are no other restrictions on defendant's power to transfer the stock, he may not allege he is not the real party in interest or is restrained from fulfilling his obligations to plaintiff under the option contract.

Defendant's contention mandamus is not the proper remedy to enforce an option to purchase common stock of a corporation is equally without foundation. Plaintiff's rights and defendant's duties were delineated in trial court's February 16, 1979 order, thus fulfilling the purpose of a writ of mandamus. Since stock in the Learning Post was limited, no other remedy was available to plaintiff. Moreover, plaintiff had a personal interest in performance of the duty enjoined by law on defendant. Defendant had refused to perform the duty imposed on him. Plaintiff had a right to damages because of defendant's refusal to perform. Her remedy was unique.

Due to the foregoing considerations, trial court's order directing a writ of mandamus issue in favor of plaintiff is affirmed. Defendant thus is required immediately to take all necessary steps to transfer 500 shares of stock in the Learning Post, Ltd. to plaintiff.

AFFIRMED.