IN THE CHANCERY COURT, STATE OF WYOMING

2023 WYCH 1

Bryan Wilkinson, Plaintiff, v. Hawaiian Hospitality Group, Inc., Defendant.	Case No. CH-2022-0000012

Order on Petition for Appointment of Custodian

[¶ 1] Before the court is Bryan Wilkinson's petition for appointment as custodian of Hawaiian Hospitality Group, Inc. (FSX No. 68407789) and motion for default judgment (FSX No. 68865827). Both requests must be denied for two reasons. First, Wilkinson failed to plead facts showing the board of directors is deadlocked. And second, a corporation administratively dissolved for more than nine years may not apply for reinstatement or engage in any business other than winding up its affairs.

BACKGROUND

[¶ 2] Wyoming follows a director-centric corporate governance structure. *See* Wyo. Stat. § 17-16-801(b). But if the directors are deadlocked, a shareholder may displace the board's authority through appointment of a custodian. Wyo. Stat. § 17-16-748(a). Wilkinson petitions to do so here.

[¶ 3] Wilkinson is a shareholder of Hawaiian Hospitality Group, Inc., a Wyoming corporation publicly traded over the counter under the ticker HHGI. *Pet.* (FSX No. 68407789), ¶¶ 2, 10. Though a publicly traded company, HHGI is inactive. *Id.* ¶¶ 10, 12. The Wyoming Secretary of State administratively dissolved HHGI more than nine years ago for failure to file an annual report and pay its fees. *Id.* ¶ 12, Ex. 8.

[¶ 4] During the last decade or so, HHGI has not filed annual reports with the Wyoming Secretary of State, paid required fees to Wyoming, or filed reports with the Securities and Exchange Commission. *Id.* ¶¶ 7, 12-14. HHGI does not maintain an active website, social media presence, phone number, or email address. *Id.* ¶¶ 17-20. And HHGI and its directors have not responded to Wilkinson's demand letters. *Id.* ¶ 21.

[¶ 5] With no action or response from the directors, Wilkinson petitioned this court to appoint him custodian under Wyo. Stat. § 17-16-748. He alleges HHGI's directors are "constructively deadlocked" because they have ignored their company duties and neglected to hold shareholder meetings. *Id.* ¶ 30. Wilkinson worries HHGI will lose its "pink sheet listing" because the company is not current with its public reporting requirements. *Id.* ¶¶ 15-16.

[¶ 6] Wilkinson filed his petition and served HHGI's registered agent in November 2022. *Req. Entry of Default* (FSX No. 68614232). After HHGI failed to timely respond, Wilkinson moved for entry of default. *Id.* The clerk entered default against HHGI. *Entry of Default* (FSX No. 68686197). Wilkinson then moved for default judgment and requested a default hearing and the hearing required by Wyo. Stat. § 17-16-748(b)(ii). *Mot. for Default J.* (FSX No. 68865827).

[¶ 7] This court held the requested hearing on January 20, 2023. During that hearing, Wilkinson stated HHGI has no assets or value other than its status as a public company. To extract this value, Wilkinson wishes to perform a reverse merger where a private firm seeking to go public would acquire the assetless but public HHGI. Wilkinson posits a private firm might be interested in a reverse merger to expedite its access to capital markets and limit legal, accounting, and compliance costs.

[¶ 8] During the hearing, the court expressed concerns about the theory of "constructive deadlock" and the ability of an administratively dissolved company to merge with another entity and operate as an active public company. In response to these concerns, Wilkinson filed supplemental briefing showing instances where district courts have granted petitions for shareholders to serve as custodians or receivers of dissolved entities. *Supp. Br.* (FSX No. 68985917).

LEGAL STANDARD

[¶ 9] Obtaining a default judgment is a two-step process: (1) entry of default and (2) entry of default judgment. W.R.C.P.Ch.C. 55.

[¶ 10] The first-step (entry of default) forecloses the defaulting defendant from defending a claim on the merits and "establishes the fact of liability according to the complaint." *Loeffel v. Dash*, 2020 WY 96, ¶ 24, 468 P.3d 676, 682 (Wyo. 2020). If the complaint does not establish liability, then the second step (entry of default judgment) is inappropriate. 10 A Wright & Miller, Fed. Prac. and Pro. Civ. § 2688.1 (4th ed.) (collecting cases standing for the proposition that default does not constitute a legitimate cause of action, a court must consider whether the complaint's allegations of fact state a cause of action).

[¶ 11] Put differently, a defaulting defendant admits well-pleaded allegations of fact, but he does not admit mere conclusions of law. *Motamoa Holdings Ltd. v. Vl Media LLC*, No. 21-CV-198-NDF, 2023 WL 2047509, at *4 (D. Wyo. Feb. 16, 2023) (quoting *Bixler v. Foster*, 596 F.3d 751, 762 (10th Cir. 2010)). "The default judgment must be supported by a sufficient basis in the pleadings." *Avus Designs, Inc. v. Grezxx, LLC*, No. 22-CV-0173-SWS, 2022 WL 17404426, at *1 (D. Wyo. Dec. 2, 2022) (citing *Tripodi v. Welch*, 810 F.3d 761, 764 (10th Cir. 2016)).

ANALYSIS

A. Deadlock is more than inaction; it is inaction caused by dissension among directors.

[¶ 12] Based on the Model Business Corporations Act, Wyoming's Business Corporation Act authorizes shareholders to seeks appointment of a custodian or receiver in two situations: deadlock and fraud. The act provides:

> The district court may appoint one (1) or more persons to be custodians, or, if the corporation is insolvent, to be receivers, of and for a corporation in a proceeding by a shareholder where it is established that:
>
> > (i) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered; or
> >
> > (ii) The directors or those in control of the corporation are acting fraudulently and irreparable injury to the corporation is threatened or being suffered.

Wyo. Stat. § 17-16-748(a).

[¶ 13] Of the two available theories, Wilkinson alleges deadlock. Because the statute is unambiguous and neither statute nor model act comments define "deadlock," this court must look to the term's plain and ordinary meaning.[1] *Big Al's Towing & Recovery v. Dep't of Revenue,* 2022 WY 145, ¶¶ 16-17, 520 P.3d 97, 102 (Wyo. 2022). Though the Wyoming Supreme Court has not determined deadlock's ordinary meaning, sister state courts have by consulting dictionaries. *E.g., Callier v. Callier*, 378 N.E.2d 405, 408 (Ill. App. Ct. 1978) (describing "deadlock" as a "a state of inaction or of neutralization caused by opposition of persons or of factions as in a government or voting body.") (quoting Webster's New Int'l Dictionary, Unabridged 674 (2d 3d. 1956)). *Cf. In re Birkholz*, 2019 WY 19, ¶ 13, 434 P.3d 1102, 1105-06 (Wyo. 2019) ("When we examine 'plain language,' we are often guided by dictionary definitions of the terms used in the statute.").

[¶ 14] Take your pick of dictionaries: Merriam-Webster, Oxford American, Black's Law. Each defines "deadlock" not as mere inaction, but as inaction caused by dissension among decisionmakers.

- Meriam-Webster: "deadlock" is "a stoppage of action because neither faction in a struggle will give in."[2]
- Oxford American: "deadlock" means "a complete failure to reach agreement or settle an argument." [3]
- Black's Law: "deadlock" is "a state of inaction resulting from opposition, a lack of compromise or resolution, or a failure of election." In the corporate context, "deadlock" means "[t]he blocking of corporate action by one or more factions of shareholders or directors who disagree about a significant aspect of corporate policy."[4]

[¶ 15] As these definitions show, "deadlock" has a two-part definition: (1) inaction (2) caused by dissension among decisionmakers. *See Wilcox v. Stiles*, 873 P.2d 1102, 1105 (Or.

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[1] While Wyoming statute does not define deadlock, Delaware's comparable statute describes deadlock as "directors [who] are so divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division." 8 Del. C. § 226.

[2] Deadlock, The Merriam-Webster Dictionary (2004).

[3] Deadlock, New Oxford American Dictionary (2010, 3d. Ed.).

[4] Deadlock, Black's Law Dictionary (11th Ed. 2019).

Ct. App. 1994) (defining deadlock as the "inaction which results when two equally powerful factions stake out opposing positions and refuse to budge.") This two-part definition animates judicial application of the term in the corporate context.

[¶ 16] Take, for example, New York courts that reason failure to hold shareholder meetings and disseminate financial information is insufficient to establish deadlock. *In re Parveen*, 259 A.D.2d 389, 391 (N.Y. App. Div. 1999). Petitioners must allege "deadlock over a management decision." *Id. See also Nelkin v. H.J.R. Realty Corp.*, 255 N.E.2d 713, 716-17 (N.Y. 1969) (Finding petition to dissolve corporation based on deadlock inadequate because it does not allege "the shareholders are so divided that they have failed to elect directors but merely that the corporation failed to call a meeting for such purpose. . . .")

[¶ 17] As another example, consider Massachusetts courts that look for both inaction and dissension when determining whether deadlock exists. *Koshy v. Sachdev*, 477 Mass. 759, 766-68, 81 N.E.3d 722, 730-31 (Mass. 2017). They ask if "irreconcilable differences among the directors have resulted in corporate paralysis" and they consider "the degree and extent of distrust and antipathy between the directors." *Id.*

[¶ 18] As one last example, note how the Wyoming Supreme Court described deadlock in the closely related corporate dissolution context as "a stalemate that has paralyzed the functioning of the corporation." *Sullivan v. Pike & Susan Sullivan Found.*, 2018 WY 19, ¶ 27, 412 P.3d 306, 313 (Wyo. 2018). The term "stalemate" is instructive because it describes "a situation in which further action or progress by opposing or competing parties seems impossible." Stalemate, The Oxford American College Dictionary (2002).

[¶ 19] These definitions and cases lead to an intuitive conclusion: It is not enough to allege corporate paralysis. A petitioner must allege paralysis resulting from a stalemate between directors that shareholders cannot break.

[¶ 20] Yet, here, Wilkinson alleges no dissension among the directors. Instead of alleging opposition resulting in inaction, Wilkinson alleges "constructive deadlock." No reported case has been called to the court's attention, nor has the court found any, adopting the theory of "constructive" or "functional" deadlock. And with good reason. There can be no deadlock in the management of corporate affairs where, as alleged here, the directors have declined to manage corporate affairs. Stated succinctly, corporate abandonment is not corporate deadlock.

[¶ 21] True, Wilkinson supplemented his petition with examples of Wyoming district courts who appointed custodians or receivers under similar circumstances at the default judgment stage. But these examples are unpersuasive because none of the courts engaged in a detailed analysis of Wyo. Stat. § 17-16-748.

B. As a corporation that has been dissolved for over nine years, HHGI may not apply for reinstatement or engage in any business outside of winding up its affairs.

[¶ 22] Even if Wilkinson had a basis on which to allege "deadlock," Wyoming law does not permit the reverse merger he seeks.

[¶ 23] HHGI has been administratively dissolved for over nine years. *Pet.* ¶ 12, Ex. 8. A Wyoming corporation administratively dissolved for more than two years may not apply for reinstatement. Wyo. Stat. § 17-16-1422(a). Instead, it "continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business affairs." Wyo. Stat. § 17-16-1421(c). The statutory list of permitted winding-up activities does not include continuing as a publicly traded company after a reverse merger. Wyo. Stat. § 17-16-1405.

[¶ 24] Wilkinson references examples of court-appointed custodians and receivers who he claims reinstated entities more than two years after administrative dissolution. *Supp. Br.* The examples show no such thing. Rather than file articles to reinstate the dissolved entities, the exemplar custodians and receivers filed articles to incorporate new entities under the dissolved entities' names. *Id.* at *Ex.* 3, ¶ 2. This process of creating a distinct entity is not the functional equivalent of reinstating a dissolved entity. It is also not a process contemplated by Wyo. Stat § 17-16-748. That statute permits appointment of a custodian or receiver over an existing corporation, not appointment of a custodian or receiver over a corporation's name or a new and distinct entity formed under that name.

[¶ 25] This is all to say, even if this court appointed Wilkinson as custodian or receiver, Wyoming law would not permit him to do anything other than wind up and liquidate HHGI's business affairs.

CONCLUSION

[¶ 26] When taken as true, the facts alleged by Wilkinson do not constitute deadlock under Wyo. Stat. Ann. § 17-16-748. Accordingly, Wilkinson's petition for appointment as

custodian and motion for default judgment are **DENIED** and this case is **DISMISSED** with prejudice.

[¶ 27] Though this court "should freely give leave [to amend a petition] when justice so requires," W.R.C.P.Ch.C. 15(a)(2), it declines to do so here because amendment cannot cure the limitations of corporation law. That law limits a corporation dissolved for more than nine years from applying for reinstatement and existing for any business purpose outside of winding up its affairs. Performing a reverse merger is not winding up affairs.

IT IS SO ORDERED.

DATED: 3/27/2023

/s/ Richard L. Lavery
CHANCERY COURT JUDGE