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Revival Of Corporation Terminates Agent's Liability On Post Forfeiture Contract

*Marsh Furniture Company v. Solomon*¹

The charter of a Maryland corporation was forfeited in 1955, pursuant to Article 81, Section 204,² for nonpayment of its 1955 franchise tax, although the State Tax Commission accepted the corporation's payment of its 1956 and 1957 taxes. In July, 1957 defendant president of the corporation, claiming to have no knowledge of the forfeiture and believing the corporation to have capacity to contract, created a debt to the plaintiff in the name of the corporation

¹ The Daily Record, Dec. 4, 1958 (Balto. City Court, Md. 1958).

² 7 MD. CODE (1957) Art. 81, §204 which states:

"(a) . . . If any domestic corporation shall refuse or neglect to pay to the State, or the proper officers thereof, any franchise tax, any gross receipts tax, or any other State tax due by it, . . . or if any domestic corporation shall refuse or neglect to file an annual report with the State Tax Commission . . . it shall be the duty of the Comptroller of the State to certify immediately thereafter to the Governor a list of all such corporations . . . and the Governor shall forthwith issue and publish his proclamation declaring under this section that the charters of such corporations shall be repealed, annulled and forfeited, and that the powers conferred by law upon such corporations shall be inoperative, null and void, upon the date of the first publication of such proclamation, without the necessity of proceedings of any kind either at law or in equity."

and in the usual course of business. The plaintiff was also uninformed as to the status of the corporation. Plaintiff sued defendant personally in Peoples' Court of Baltimore City on March 26, 1958,³ despite the fact that the dissolved corporation filed its Articles of Revival, as provided by Article 23, Section 85,⁴ on March 19, 1958.

Plaintiff contended that defendant became personally obligated when he contracted in the name of a corporation whose charter had been forfeited for a franchise tax delinquency, and the subsequent revival of the corporation did not extinguish this personal liability. Defendant argued that when the corporation was revived and assumed all obligations properly incurred on its behalf during the period of forfeiture, the personal liability, if any, of the agent who had acted for the corporation during that period was extinguished.

The Peoples' Court, in allowing plaintiff to recover, did not deny that a corporation becomes liable for contracts consummated by its agents during the interval between forfeiture and revival, but reasoned that the individual liability of the agent is not automatically absolved by the reinstatement of the corporation's charter. That court regarded the corporation in such circumstances as non-existent and applied general principles of agency which make the agent of a non-existent corporation personally liable.

On appeal the Baltimore City Court reversed. The Court ruled that under the facts of this case the defendant was not personally liable for the debt he incurred in the name of the corporation. The Court emphasized the fact that plaintiff admittedly extended credit to the corporation exclusively in the transaction sued upon, and that the

³ The Daily Record, Oct. 1, 1959 (Peoples' Court of Baltimore City, Md. 1958).

⁴ 2 MD. CODE (1957) Art. 23, §85(d) provides:

"Such revival of the charter of the corporation shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by the corporation, its officers and agents during the time when the charter was void, with the same force and effect and to all intents and purposes as if the charter had at all times remained in full force and effect. All real and personal property, rights and credits of the corporation at the time its charter became void and of which it was not divested prior to such revival shall be vested in the corporation, after such revival, as fully as they were held by the corporation at the time its charter became void. The corporation after such revival shall be liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its officers and agents prior to such revival as if the charter had at all times remained in full force and effect."

parties had business dealing with one another both prior and subsequent to the forfeiture in 1955. It said:

"The effort to hold the defendant responsible for the debt is based on a technical situation discovered long after the sale was made and which was not in contemplation of the parties at the time of the sale."⁵

The Court construed the corporation forfeiture and revival provisions of the Code as a method of securing the prompt payment of revenue, with the corporation being prohibited from doing business until its charter is reinstated.

The Court of Appeals has stated that the forfeiture of a corporate charter by the State Tax Commission for non-payment of taxes puts an end to the corporate existence, and the rights of creditors become fixed at that time.⁶ In *Atlantic Mill & Lumber Realty Co. v. Keefer*,⁷ the Court interpreted the effect of such a forfeiture.⁸

"The intent of the Legislature seems to be clear that all powers granted to such corporations after forfeiture shall be inoperative, null, and void. This organization, whose charter is forfeited, is not legally in existence as a corporation and cannot function as a corporation."⁹

It seems clear that agents incur personal liability by contracting for a corporation whose charter has been forfeited and not yet revived,¹⁰ but does this liability persist if the creditor institutes suit against the agent alone after the corporation has been revived?

In *Deutsch v. Aaron & Lillie Strauss Foundation*,¹¹ suit was filed against a charitable corporation¹² and its presi-

⁵ The Daily Record, Dec. 4, 1958 (Balto. City Court, Md. 1958).

⁶ Callahan v. Clemens, 184 Md. 520, 528, 41 A. 2d 473 (1945), involving dissolution under Md. CODE (1939) Art. 23, §100 [now 2 MD. CODE (1957) Art. 23, §78].

⁷ 179 Md. 496, 20 A. 2d 178 (1941).

⁸ As provided in Md. CODE (1939) Art. 81, §§152 [now 7 MD. CODE (1957) Art. 81, §204] and 153 [now 2 MD. CODE (1957) Art. 23, §85] and Art. 23, §§100, 104, 105 [now 2 MD. CODE (1957) Art. 23, §84].

⁹ *Supra*, n. 7, 499. See also BRUNE, MARYLAND CORPORATION LAW AND PRACTICE (REV. ED. 1953) §406.

¹⁰ 16 FLETCHER, CYCLOPEDIA CORPORATIONS (1942) §§8132, 8141. But compare Thompson v. Park Sav. Bank, 77 F. 2d 955 (D.C.C.A. 1935) and Epstein v. Henry, 302 Ill. App. 507, 24 N.E. 2d 266 (1939) where corporate directors or stockholders were not personally liable for business conducted after expiration of their charter, involving an extension of the doctrine of de facto corporations. See BALLANTINE, CORPORATIONS (REV. ED. 1946) §34.

¹¹ 155 F. Supp. 551 (D. Md. 1957).

¹² Not wholly immune in this case.

dent, individually, for injuries sustained while plaintiff was enrolled at a summer camp operated by the corporation. The corporation's charter had been forfeited in 1943 for non-payment of taxes, and was not revived until 1953, during which time the corporation continued its benevolent activities. Plaintiff's accident occurred in 1952, but the action was instituted after the corporation's revival. In granting a motion for summary judgment in favor of the individual defendant, Judge Thomsen, in construing Article 23, Section 85(d),¹³ declared that in absence of fraud or participation in the tort, the officer of the corporation should not be held personally liable after the charter had been revived.

In *Held v. Crosthwaite*,¹⁴ involving the application of a New Jersey statute¹⁵ similar to that of Maryland, the Court reached the same conclusion in a contract situation. Defendants, insurance brokers, executed a marine policy, in the name of their company, with plaintiff in 1917. The Governor of New Jersey had proclaimed the Company's charter void in 1915 for non-payment of taxes, although neither party was aware of the forfeiture. When plaintiff's ship sank and the underwriter refused to pay for the loss, the former filed suit against defendants individually, despite the fact that the Governor had previously revoked his proclamation and reinstated the company. The Court rejected plaintiff's contention that defendants had contracted as agents of a non-existent corporation, and left plaintiff with his remedy against the corporation only. The Court reasoned that under the statute, the Governor might proclaim the charter of a tax delinquent corporation forfeited, and all rights and privileges of that corporation inoperative and void, but upon payment of the franchise tax the Governor had the power to repeal his initial proclamation and proclaim the corporate charter revived. Since it was not within the power of the Governor to create a new corporation,¹⁶ the second proclamation of reinstate-

¹³ 2 MD. CODE (1957).

¹⁴ 260 F. 613 (2d Cir. 1919), discussed in 19 Col. L. Rev. 391, 393 (1919).

¹⁵ Laws of 1905, ch. 259, §§1, 2 and 7 [now 54 N.J.S.A. (1940) 54:11-1, 2 and 5], set out in full *supra*, 614-615.

¹⁶ *Cf.* MD. CONSTITUTION, Art. III, §48:

"Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes and except in cases where no general laws exist, providing for the creation of corporations of the same general character, as the corporation proposed to be created; and any act of incorporation passed in violation of this section shall be void. All charters granted, or adopted in pursuance

ment must be held to relate to the first proclamation of repeal, and the old corporation must be regarded as having continuously existed so far as the State is concerned.¹⁷ Absent fraud and knowledge of the forfeiture, and considering that both parties intended the company alone to be liable, the revival proclamation must validate all acts of such agents from the date of the forfeiture and place liability in the corporation alone.¹⁸

A lower New York Court held to the contrary in *Poritzky v. Wachtel*.¹⁹ Notwithstanding the forfeiture of the charter in 1935, defendant, as president of the corporation, continued to purchase merchandise in the name of the corporation from plaintiff until 1937. Plaintiff sued defendant individually in July, 1940, and moved for summary judgment in January, 1941. During the litigation, the corporation was revived. Defendant admitted he would be liable if no revival had occurred, but argued that the reinstatement of the charter operated retroactively to restore the corporate entity, thereby validating ab initio the acts of agents acting in behalf of the corporation during the period of forfeiture. Plaintiff was granted the summary judgment since the motion was filed before reinstatement occurred.²⁰ The Court feared that defendant's interpretation of the statute²¹ would promote fraud in that an officer of a dissolved corporation, who obtained credit, could shift his personal liability to the corporation merely by paying the delinquent taxes. It emphasized that this corporation was closely held and for several years without assets, and therefore an action against the corporation would be worthless.

The Maryland Court of Appeals has never construed Article 23, Section 85(d) as to its effect upon the status

of this section, and all charters heretofore granted and created, subject to repeal or modification, may be altered, from time to time, or be repealed;"

¹⁷ 260 F. 613, 616 (2d Cir. 1919).

¹⁸ The Court stated that during the interval between the two proclamations the corporation was at least a *de facto* corporation. 19 Col. L. Rev., *supra*, n. 14, takes issue with the Court's extension of the *de facto* corporation doctrine.

¹⁹ 176 Misc. 633, 27 N.Y.S. 2d 316 (1941).

²⁰ *Ibid.*, 318:

"[T]he validity or invalidity of the cause of action upon which the motion for Summary Judgment is made must depend upon the facts existing at the time the action was commenced, or at least, at the time the motion for summary judgment was made." (Italics supplied.)

See RESTATEMENT, AGENCY 2nd (1958) §338, Illustration (2).

²¹ N.Y. TAX LAW §203-a.

of a corporation whose charter has been forfeited, nor has the Court determined the liability of the contracting agent once the corporate charter has been reinstated. In *Redwood Hotel, Inc. v. Korbien*,²² the Court, in allowing a revived corporation to file an appeal, merely quoted the statute which provided that such charter revival shall validate all acts done within the scope of its charter by officers and agents during the time when such charter was void, with the same force as if said charter had at all times remained in effect.²³ This case, however, did not qualify the principle enunciated in *Atlantic Mill & Lumber Realty Co. v. Keefer*,²⁴ that a corporation, whose charter had been forfeited and not yet revived, is not legally in existence and cannot function as a corporation.

Most jurisdictions construing similar revenue statutes, appear to hold that a corporation is not completely extinguished during the period between forfeiture and reinstatement of its charter for non-payment of taxes.²⁵ When the

²² 197 Md. 514, 80 A. 2d 28 (1951).

²³ MD. CODE SUPP. (1947), Art. 81, §153 [now 2 MD. CODE (1957) Art. 23, §85]. See also *Seaboard Terminals Corporation v. Standard Oil Co.*, 35 F. Supp. 566 (S.D. N.Y. 1940).

²⁴ 179 Md. 496, 20 A. 2d 178 (1941).

²⁵ In *J. B. Wolfe, Inc. v. Salkind*, 3 N.J. 312, 70 A. 2d 72, 13 A.L.R. 2d 214 (1949), the court followed the reasoning laid down in *Held v. Crosthwaite*, 260 F. 613 (2d Cir. 1919), *supra*, p. 147, discussed in 19 Col. L. Rev. 391, 393 (1919). The New Jersey Statutes, 54 N.J.S.A. (1940) §54:11-2, 5, being substantially unchanged from those involved in the *Held* case, *supra*, n. 14, the court held that a reinstatement of a repealed charter relates back to the proclamation of repealer and validates corporate action taken in the interim; it was not the intent of the Legislature to absolutely destroy the corporation upon its failure to pay taxes and upon the Governor's proclamation of repeal.

The Court ruled, in *Wax v. Riverview Cemetery Co.*, 41 Del. 424, 24 A. 2d 431, 436 (1942) that:

"Under our taxing statute we think that a corporation which has been proclaimed for non-payment of taxes is not completely dead. It is in a state of coma from which it can be resuscitated, but until this is done its powers as a corporation are inoperative, and the exercise of these powers is a criminal offense. It still can serve as repository of title and as obligor of a debt."

4 DEL. CODE ANN. (1953), Tit. 8, §511, and Tit. 8, §312 resemble the Maryland Code provisions, *supra*, ns. 2, 4, relating to forfeiture and revival. *Watts v. Liberty Royalties Corporation*, 106 F. 2d 941 (10th Cir. 1939) reached the same conclusion construing this Delaware statute. See also *Dominion Oil Co. v. Lamb*, 119 Colo. 62, 201 P. 2d 372 (1949) construing the Colorado statute, *Lyons v. Texoradio Oil & Gas Co.*, 91 S.W. 2d 375 (Tex. Civ. App. 1935) construing the Texas statute, *Gillen-Cole Co. v. Fox & Co.*, 146 Ore. 203, 29 P. 2d 1019 (1934), *Huey v. National Bank of Fitzgerald*, 177 Ga. 64, 169 S.E. 491 (1933), *McClung v. Hill*, 96 F. 2d 236 (5th Cir. 1938) construing the Florida statute.

See annotation in 13 A.L.R. 2d 1220. See also BALLANTINE, CORPORATIONS (Rev. ed. 1946) §34 as to discussion of corporate existence after expiration of charter.

statute is intended as a revenue measure²⁶ and provides for both the revival of the corporation upon payment of delinquent taxes and the validation of acts during the period of suspension, the proclamation of forfeiture for nonpayment of taxes does no more than forfeit the corporate right to do business. The corporation is not extinguished as a legal entity.²⁷

Despite the effect of forfeiture, as provided by Article 81, Section 204, the strength of the language of Article 23, Section 85(d), as to revival, indicates the absence of an intent on the part of the Legislature to extinguish a corporation completely during the period between forfeiture and revival. The latter section clearly declares that the corporation after such revival shall be liable for all acts performed in its name by its agents prior to revival *as if the charter had at all times remained in full force and effect*. As long as the agent does not contract for a completely non-existent principal, there is no reason to hold that agent personally liable once his disclosed principal has validated the agent's acts and has assumed liability of its own.

The effect of ratification in agency law is analogous to the result reached by the Court in this case. When a principal ratifies the unauthorized contract of his purported agent, the agent's liability to the other party to the contract for breach of warranty of authority is terminated.²⁸ In its effect on the agent's personal liability, the revival of a corporation under Article 23, Section 85(d) seems equivalent in theory to ratification by a principal of unauthorized conduct.

²⁶ As opposed to an exercise of the State's regulatory or police power.

²⁷ 16 FLETCHER, CYCLOPEDIA CORPORATIONS (1942) 706 states:

"Reinstatement of the corporation validates previous corporate acts, unless under the terms of the statute the delinquent corporation is, during the period of suspension, wholly without power to act or contract and its attempted acts or contracts are entirely void."

Compare *Leibson v. Henry*, 356 Mo. 953, 204 S.W. 2d 310 (1947), where corporate directors were held personally liable for unemployment contributions assessed against the corporation during the continuance of operation of the business after the charter had been forfeited for failure to file an annual report and anti-trust affidavit. The forfeiture of a corporate license for failure to file an annual report, etc. operated, in this case, as an ipso facto dissolution of the corporation, resulting in the corporation's ceasing to be a corporation *de jure* and *de facto*. See also *Clark Estate Co. v. Gentry*, 362 Mo. 80, 240 S.W. 2d 124 (1951), *Van Landingham v. United Tuna Packers*, 189 Cal. 353, 208 P. 973 (1922), *Title Co. v. 4136 Wilcox Bldg. Corp.*, 302 U.S. 120 (1937).

²⁸ RESTATEMENT, AGENCY 2d (1958), §338, MECHEM, OUTLINES OF AGENCY (3d ed. 1923) §163.

Judge Rhynhart, of the Peoples' Court, held that an officer who incurred personal liability by contracting in the name of a corporation during the time its charter was forfeited should not have the right to escape such liability by electing to reinstate the corporation. On the other hand, there is little reason to give the creditor the election of suing either the agent or the corporation, once the latter has filed its Articles of Revival. If the corporation is never revived, the contracting agent remains liable, but once the revival occurs, the corporation assumes the same liability it would have had if the charter had remained in effect. If the charter had *not* been forfeited, the creditor would have no such election. It seems unnecessary to give the creditor more than what he originally expected.²⁹

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²⁹ "It can not be considered a hardship that the parties should be held to their common understanding." *Held v. Crosthwaite*, 260 F. 613, 617 (2d Cir. 1919).