

III. INAPPLICABILITY OF BANKRUPTCY LAW

Defendants argue that this case should be heard in Pohnpei state court because the 2005 Bankruptcy law, codified at FSM Code Title 31, provides the appropriate legal framework for this matter. This argument must also fail as none of the Defendants have commenced a case under bankruptcy law.

IV. CONCLUSION

Plaintiff has successfully met the burden of demonstrating that this Court has subject matter jurisdiction over this case. Therefore, Defendants' motion to dismiss is HEREBY DENIED.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FSM TELECOMMUNICATIONS CORPORATION,)	CIVIL ACTION NO. 2010-035
)	
Plaintiff,)	
)	
vs.)	
)	
BELLARMINE HELGENBERGER, individually and)	
d/b/a BERNARDS, ISLAND CABLE TV POHNPEI,)	
INC., CENTRAL MICRONESIA COMMUNICATIONS,)	
INC., and BERNARD'S ENTERPRISES, INC.,)	
)	
Defendants.)	
)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ready E. Johnny
Associate Justice

Trial: September 30, October 1-2, 2013
Decided: January 16, 2014

APPEARANCES:

For the Plaintiff:	Fredrick L. Ramp, Esq. Ramp & Mida Law Firm P.O. Box 1480 Kolonias, Pohnpei FM 96941
For the Defendant:	Bellarmino Helgenberger, pro se P.O. Box 460 Kolonias, Pohnpei FM 96941

237
FSM Telecomm. Corp. v. Helgenberger
19 FSM R. 236 (Pon. 2014)

For the Defendants: Marstella E. Jack, Esq.
(CMC, & Bernard's Enters.,) P.O. Box 2210
Kolonias, Pohnpei FM 96941

For the Defendant: Joseph S. Phillip, Esq.
(Island Cable TV) P.O. Box 464
Kolonias, Pohnpei FM 96941

* * * *

HEADNOTES

Business Organizations – Corporations – Dissolution

Under Pohnpei state law, the court has the full power to order a corporation's assets and business liquidated if certain statutory conditions have been established in a lawsuit by a shareholder. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 241 (Pon. 2014).

Business Organizations – Corporations – Dissolution

Under Pohnpei state law, it is sufficient ground for the court to order a corporation's liquidation if the shareholders are deadlocked in voting power and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 241 (Pon. 2014).

Business Organizations – Corporations – Dissolution; Business Organizations – Corporations – Stock and Stockholders

It is sufficient ground for the court to order the corporation's liquidation when the two shareholders, each having 50% of the votes, are deadlocked in voting power and when the shareholders have been unable to elect successor directors at a shareholders' meeting for more than two consecutive annual meeting dates since no shareholder meetings have been held for almost ten years because one shareholder has absented itself from any shareholders' meeting, thus depriving the meeting of a quorum. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 241 (Pon. 2014).

Business Organizations – Corporations – Stock and Stockholders

Pohnpei state law requires that corporations conduct annual shareholders' meetings and provides that a majority of the shares entitled to vote, represented in person or by proxy constitute a quorum at a shareholders' meeting. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 241 (Pon. 2014).

Business Organizations – Corporations – Dissolution

The protracted inability of the shareholders to obtain a quorum for a shareholders' meeting is, of itself, a hopeless deadlock. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 242 (Pon. 2014).

Business Organizations – Corporations – Dissolution

It is sufficient ground for the court to order a corporation's liquidation when the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and when irreparable injury to the corporation is being suffered or is threatened by reason of the deadlock. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 242 (Pon. 2014).

Business Organizations – Corporations – Dissolution

When each of the two shareholders had two members of the board that supported their

shareholder's position on financing expansion and when neither side could agree on the selection of a fifth director or appears to have tried, this was a true deadlock. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 242 (Pon. 2014).

Business Organizations – Corporations – Dissolution; Business Organizations – Corporations – Stock and Stockholders

When no further board action is possible because no quorum for a board of directors meeting is possible since there are now only two directors; when, under Pohnpei state law, a majority (that is, three) is the quorum needed for a board meeting to conduct business; and when none of the board vacancies can be filled since one shareholder has, by its absence, prevented any shareholders' meetings from being held, the board of directors is unable to conduct business since it cannot obtain a quorum. The shareholder deadlock creates a directors' deadlock – inability to conduct business. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 242 (Pon. 2014).

Business Organizations – Corporations – Dissolution

The court can order a corporation's liquidation when the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 242 (Pon. 2014).

Business Organizations – Corporations; Business Organizations – Corporations – Stock and Stockholders

Pohnpei statutory law prohibits corporations from lending money to the corporation's directors or employees without shareholder authorization given only if the board of directors decides that such loan or assistance may benefit the corporation. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 242 (Pon. 2014).

Business Organizations – Corporations – Dissolution

For a 50% shareholder to run a corporation as if it were his sole proprietorship is oppressive to the other 50% shareholder, and for the corporation to refuse to cooperate with an accounting firm to facilitate its audit review of the corporation is also oppressive behavior. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 242 (Pon. 2014).

Business Organizations – Corporations – Dissolution

A corporation's liquidation may be ordered when the corporate assets are being misapplied or wasted. A corporation's unauthorized \$30,000 non-interest bearing loan to a company, which was and is controlled by a director, was a misapplication or a waste of the corporation's corporate assets, and the corporation's refusal to cooperate with an accounting firm to facilitate its audit review of the corporation leaves the impression that other corporate assets may have been wasted or misapplied. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 242 (Pon. 2014).

Business Organizations – Corporations – Dissolution

Under Pohnpei law, a liquidating receiver can be appointed only after a hearing on notice. At the hearing, the court will consider what powers and duties the liquidating receiver should have so that the appointment order can, as required by statute, clearly state what those powers are and the receiver's compensation. A liquidating receiver may be required to post a bond. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 243 & n.2 (Pon. 2014).

Business Organizations – Corporations – Stock and Stockholders

Only a corporation's board of directors has the power to either declare and pay a dividend or pay a capital distribution, and then only if certain circumstances exist. An audit may need to be conducted to determine if those conditions exist. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 243 (Pon. 2014).

Business Organizations – Corporations – Dissolution

An audit will be part of any liquidating receiver's duties. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 243 (Pon. 2014).

Business Organizations – Corporations – Dissolution

Under Pohnpei law, the court appointing a liquidating receiver for a corporation shall have exclusive jurisdiction of the corporation and its property, wherever situated. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 243 (Pon. 2014).

Business Organizations – Corporations – Dissolution

Once the liquidating receiver is appointed, liquidation (sale) of the corporation will proceed thereafter unless the circumstances drastically change and it is established that cause for liquidation no longer exists. FSM Telecomm. Corp. v. Helgenberger, 19 FSM R. 236, 244 (Pon. 2014).

* * * *

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On September 30, 2013, the court heard opening arguments and then tried the case on October 1-2, 2013. Simao Iehsi, Rodelio Hermano, Pedra Kanichy, Takuro Akinaga, Jeffrey Nedlec, Christina James, defendant Bellarmine Helgenberger, John Sohl, Freddy Perman, and Annes Lebehn testified. Although the court did not request any since all parties had made oral closing arguments, defendant Bellarmine Helgenberger filed a written closing argument on October 11, 2013, and the plaintiff, FSM Telecommunications Corporation ("Telecom") filed its written response on November 11, 2013. The court considers the case submitted to it for decision.

On November 6, 2013, Telecom and defendant Bernie Helgenberger moved to dismiss Bernie Helgenberger because no evidence at trial had shown culpability on his part. That motion was granted.

Based on the witnesses' testimony and the evidence and exhibits admitted by stipulation or without objection, the court makes the following

FINDINGS OF FACT.

Island Cable TV Pohnpei, Inc. ("ICTV") is a business that was incorporated on November 15, 1990. Two other corporations, Central Micronesia Communications, Inc. ("CMC") and United Micronesian Development Association ("UMDA"), each owned 50% (or 252,902 shares) of Island Cable TV, Inc.'s 505,804 shares (par value \$1). In November 1998, Telecom bought UMDA's shares for \$600,000. ICTV paid a substantial dividend to CMC and UMDA shortly before Telecom made its purchase. No dividend has been declared and paid since then.

Bernard Helgenberger owned CMC and was president of ICTV. He operated the ICTV business. While Bernard Helgenberger was alive there were annual shareholder meetings and a functioning board of directors that held regular board meetings. ICTV has a five-member board of directors. CMC nominated and had enough votes to elect two directors. Telecom nominated and had enough votes to elect two directors. Those four directors selected a neutral, fifth director.

In 2001, Bernard Helgenberger died. The Pohnpei Supreme Court appointed Bernard Helgenberger's oldest son, Bellarmine Helgenberger, as the administrator of Bernard Helgenberger's

estate. Bernard Helgenberger had been the beneficial owner of both Bernard's Enterprises, Inc. and CMC. (CMC was wholly owned by Bernard's Enterprises, Inc., which was wholly owned by Bernard Helgenberger.)

After Bernard Helgenberger's death, ICTV loaned \$30,000 to Bernard's Enterprises, Inc. ICTV's board of directors did not authorize this loan; nor did it decide that the loan would benefit ICTV. Bernard's Enterprises, Inc. was then and is now owned or controlled by Bellarmine Helgenberger. The \$30,000 has not been repaid. The loan does not bear interest.

The ICTV Board of Directors met on November 5, 2002; December 6, 2003; and August 17, 2004.

Peter Sinclair, the fifth director, resigned in late 2004. ICTV has not had a fifth, neutral director since then. Nor has a board meeting been held. Takuro Akinaga resigned from the ICTV board on June 1, 2010, because no board meetings had been held in a long time and because he had retired from his position as Telecom's President and CEO. John Sohl also resigned from the ICTV board in 2010 because he also had retired from Telecom and because there had not been any ICTV board meetings for many years. Sohl had been the board's secretary who kept the board meeting's minutes.

On November 1, 2002, the Pohnpei Legislature passed Legislative Resolution No. 128-02, asking ICTV to expand its television services to cover the entire island of Pohnpei. ICTV's service was then and is currently available only in Kolonia Town and parts of U, Sokehs, and Nett. Telecom took the Pohnpei Legislature's resolution seriously and commissioned a cost study by Marianas Cable Vision. It estimated that \$1.3 million would be needed to extend ICTV's service island-wide. ICTV was unable to obtain an FSM Development Bank loan to finance its expansion.

Telecom proposed three possible methods to finance ICTV's expansion: a) Telecom and CMC each put up 50% (the amount equal to their shareholdings) of the cost; b) each shareholder borrow 50% of the projected cost; and c) Telecom put up the entire \$1.3 million and ICTV would be reorganized to give Telecom more shares (and thus become majority stockholder) because of its greater capital investment. CMC's counterproposal, through Bellarmine Helgenberger, was that Telecom provide the entire \$1.3 million and that ICTV would be responsible for repaying that loan and that ICTV's reorganization to give Telecom more shares would only be possible when and if ICTV defaulted on the loan payments.

CMC and Bernard's Enterprises, Inc. are now owned or controlled by defendant Bellarmine Helgenberger. CMC and Bellarmine Helgenberger, or Bellarmine Helgenberger by himself, control ICTV.

On November 12, 2010, Telecom gave notice of an ICTV shareholders' meeting to be held at ICTV's offices on November 26, 2010. CMC's shareholder representative, Bellarmine Helgenberger, declined, a short time before the scheduled meeting, to appear at the meeting, citing a "prior commitment."¹ CMC's deliberate absence from the ICTV shareholders' meeting can only be seen as a tool to prevent the presence of a quorum and thus prevent the shareholders from taking any action or having any effect on Bellarmine Helgenberger's operation of ICTV.

ICTV is a corporation, which must comply with Pohnpei statutes governing corporations and

¹ Bellarmine Helgenberger's failure to appear at the annual meeting because of "a prior commitment" is inexplicable unless it was a deliberate attempt to prevent the holding of a shareholders' meeting by depriving it of a quorum. ICTV's shareholders' annual meeting should have been his prior commitment.

which can be run or operated only within the framework of that law. However, Bellarmine Helgenberger operates ICTV as if it were a sole proprietorship. At various times, ICTV paid for health insurance for Bellarmine Helgenberger's family members and for bills for his residential electrical use.

On July 26, 2011, as the result of Telecom's urging, ICTV entered into a contract with Deloitte and Touche to conduct an audit review of ICTV's finances. No audit review was done because Deloitte and Touche was not given access to the basic financial documents needed to start the accounting work. ICTV, CMC, Bellarmine Helgenberger, and ICTV employees all failed to provide those necessary documents although Deloitte and Touche had made requests for the documents so that it could start its work.

Telecom operates cable television services in each of the other three FSM states. ICTV and the three Telecom cable television companies have cooperated for the joint use of programming by all four cable networks because the larger the subscriber base, the less (per subscriber) the cable outlet is charged by the program providers. The three Telecom cable stations provide ICTV with their monthly reports and subscriber numbers which ICTV consolidates and sends on to the programming subscribers with payment. ICTV is paid back by the other three cable companies. Each of these four networks thereby benefitted and continues to benefit from the reduced cost per subscriber provided by having a larger subscriber base. ICTV therefore benefitted and still benefits from this reduced cost.

Based on these findings the court makes the following

CONCLUSIONS OF LAW.

Under Pohnpei state law, the court has the full power to order ICTV's assets and business liquidated if certain statutory conditions have been established in a lawsuit by a shareholder. 37 Pon. C. § 1-196(1)(a). Those conditions have been established in this shareholder's suit.

A. *Deadlocks Established*

If "the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors," it is sufficient ground for the court to order the corporation's liquidation. 37 Pon. C. § 1-196(1)(a)(iii). CMC and Telecom are deadlocked in voting power, each having 50% of the votes. The shareholders have been unable to elect successor directors at an ICTV shareholders' meeting for more than two consecutive annual meeting dates since no shareholder meetings have been held for almost ten years because CMC has absented itself from any shareholders' meeting, thus depriving the meeting of a quorum.

Pohnpei state law requires that corporations conduct annual shareholders' meetings. 37 Pon. C. § 1-127(1). CMC's failure to appear at a shareholders' meeting has deadlocked ICTV. Under Pohnpei corporation law, "a majority of the shares entitled to vote, represented in person or by proxy" constitute a quorum at a shareholders' meeting. 37 Pon. C. § 1-131.

CMC and Telecom are deadlocked in voting power – each holds exactly 50% of the voting power. Since neither CMC nor Telecom holds a majority of ICTV shares, they, or their proxies, must both appear at a shareholders' meeting for there to be a quorum. No successor directors have been elected to fill any of the three vacancies (one since 2004 and the other two since 2010) because this shareholder deadlock prevents and has prevented shareholders' meetings from being held for more than two consecutive annual meeting dates.

The defendants contend that there is no hopeless shareholder deadlock because there has been no shareholder meeting at which the shareholders have been hopelessly deadlocked. This contention is disingenuous. The protracted inability of the shareholders to obtain a quorum for a shareholders' meeting is, of itself, a hopeless deadlock.

It is also sufficient ground for the court to order a corporation's liquidation when "the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason of the deadlock." 37 Pon. C. § 1-196(1)(a)(i). When there were only four directors, the board was deadlocked and the shareholders were unable to break that deadlock since no shareholders' meetings were held because CMC would not attend, thus preventing a shareholders' quorum. ICTV has suffered irreparable injury because it has been unable to adopt any plan to expand its service or to adequately prepare for the future. ICTV has been irreparably harmed because revenues that could have accrued to ICTV from new customers if the expansion plan had been implemented have been forgone; expansion costs may have gone up; a new cost survey may be needed; and the value of ICTV's assets may have depreciated.

The defendants contend that there is no hopeless deadlock of the board of directors because there has been no board meeting at which the directors were hopelessly deadlocked. This contention is also disingenuous. Board meetings were not held after 2004. Each shareholder (CMC and Telecom) had two members of the board that supported their shareholder's position on financing expansion. Neither side could agree on the selection of a fifth director or appears to have tried. This was a true deadlock.

No further board action is now possible because no quorum for a board of directors meeting is possible since there are now only two directors (Bellarmine Helgenberger and Bernie Helgenberger, another son of Bellarmine Helgenberger) and, under Pohnpei state law, a majority (for ICTV, three) is the quorum needed for a board meeting to conduct business. 37 Pon. C. § 1-139. And since CMC has, by its absence, prevented any shareholders' meetings from being held, none of the board vacancies can be filled. The board of directors is unable to conduct business since it cannot obtain a quorum. The shareholder deadlock creates a directors' deadlock – inability to conduct business.

B. Other Liquidation Grounds Established

The court can also order a corporation's liquidation when "the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent." 37 Pon. C. § 1-196(1)(a)(ii). Bellarmine Helgenberger is in control of ICTV. The \$30,000 loan to Bellarmine Helgenberger, through the medium of Bernard's Enterprises, Inc., was illegal since Pohnpei statutory law prohibits corporations from lending money to its directors or employees without shareholder authorization given only "if the board of directors decides that such loan or assistance may benefit the corporation." 37 Pon. C. § 1-146. The ICTV board of directors never made such a decision; nor did it ever approve the loan. Moreover, for Bellarmine Helgenberger to run ICTV as if it were his sole proprietorship is oppressive to the other shareholder – Telecom. ICTV's refusal to cooperate with Deloitte & Touche to facilitate Deloitte & Touche's audit review of ICTV is also oppressive behavior.

A corporation's liquidation may also be ordered when "the corporate assets are being misapplied or wasted." 37 Pon. C. § 1-196(1)(a)(iv). ICTV's unauthorized \$30,000 non-interest bearing loan to Bernard's Enterprises, Inc., which was and is controlled by director Bellarmine Helgenberger, was a misapplication or a waste of ICTV's corporate assets.

ICTV's refusal to cooperate with Deloitte & Touche to facilitate Deloitte & Touche's audit review

of ICTV leaves the impression that other ICTV corporate assets may have been wasted or misapplied. Without a proper audit the court cannot reach a firm conclusion here.

Based on these conclusions of law, the court will order the following

REMEDIES.

Defendant Bellarmine Helgenberger asks that the court order Telecom to select and confirm its two board members. CMC and Bellarmine Helgenberger ask the court to appoint a fifth member of the ICTV board of directors and to give ICTV six months to a year to straighten the matter out. ICTV asks the court to give the parties time to get together to select a fifth board member and to then resolve matters.

The court sees no reason why it should grant the parties asking for more time to attempt to resolve the deadlock the six months to a year that they now ask for. They have already had plenty of time to try to do just that. CMC could have attended the annual shareholders' meetings and thus established a quorum within which directors could have been elected so that ICTV could try to move forward. No vacancies on the ICTV board of directors can be filled without a shareholders' meeting to elect them. Telecom was not responsible for the lack of shareholders' meetings. The court will, pursuant to Pohnpei statutory law, appoint a liquidating receiver.

Telecom recommends that Deloitte & Touche be appointed as the receiver. Under Pohnpei law, a liquidating receiver can be appointed only after a hearing. 37 Pon. C. § 1-197(2).² At the hearing, the court will consider what powers and duties the liquidating receiver should have so that the appointment order can, as required by statute, clearly state what those powers are, *see id.*, and the receiver's compensation, *id.* § 1-197(3). And a liquidating receiver may be required to post a bond. 37 Pon. C. § 1-198. Therefore, no later than February 28, 2014, any party may submit its proposal concerning the liquidating receiver's powers, duties, and compensation, and Telecom or Deloitte and Touche shall submit a formal proposal regarding the appointment of a liquidating receiver. The court will set a March hearing date at which it will consider these proposals.

Telecom asks that an audit be conducted to create a financial basis for a reasonable price for ICTV. Telecom further asks that the \$30,000 loan be treated as a dividend payment to CMC and that ICTV be ordered to issue a similar dividend to Telecom. Only a corporation's board of directors has the power to either declare and pay a dividend, 37 Pon. C. § 1-144, or pay a capital distribution, *id.* § 1-145, and then only if certain circumstances exist. Whether the board could legally declare a dividend under ICTV's current financial condition cannot be known until ICTV has been properly audited. That audit also ought to reveal if any of the \$30,000 has been repaid. The court therefore will not, at this time, grant Telecom any specific relief for the \$30,000 transfer to Bernard's Enterprises Inc. It may seek relief in the future. But the court expects that an audit will be part of any liquidating receiver's duties. "The court appointing such receiver shall have exclusive jurisdiction of the corporation and its property, wherever situated." 37 Pon. C. 1-197(4).

CONCLUSION

Telecom, a 50% shareholder of ICTV, has established in this shareholder's suit that there are

² "After a hearing had upon such notice as the court may direct to be given to all parties to the proceedings and to any other parties in interest designated by the court, the court may appoint a liquidating receiver or receivers" 37 Pon. C. § 1-197(2).

sufficient factual and legal grounds under Pohnpei state corporate law to liquidate the business and assets of a Pohnpei corporation called Island Cable TV Pohnpei, Inc. The court will therefore appoint a liquidating receiver to begin this process and a hearing will be held to consider the appointment. The parties' submissions about the liquidating receiver are due by February 28, 2014. Liquidation (sale) of the corporation will proceed thereafter unless the circumstances drastically change and "it is established that cause for liquidation no longer exists." 37 Pon. C. § 1-200.

* * * *

FSM SUPREME COURT TRIAL DIVISION

JENNIFER HARDEN and WAYNE HARDEN,)	CIVIL ACTION NO. 2010-018
)	
Plaintiffs,)	
)	
vs.)	
)	
SENIOHRA INEK and the ESTATE OF EWALT INEK,)	
)	
Defendants.)	
_____)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Martin G. Yinug
Chief Justice

Trial: May 7-8, 2013
Decided: January 22, 2014

APPEARANCES:

For the Plaintiffs: Joseph S. Phillip, Esq.
P.O. Box 464
Kolonias, Pohnpei FM 96941

For the Defendants: Salomon M. Saimon, Esq.
Micronesia Legal Services Corporation
P.O. Box 129
Kolonias, Pohnpei FM 96941

* * * *

HEADNOTES

Contracts – Formation

A contract is a promise between two parties for the future performance of mutual obligations. For the promise to be enforceable there must be an offer, acceptance, consideration and definite terms. Harden v. Inek, 19 FSM R. 244, 249 (Pon. 2014).