

7-1-2009

July 2009 New Mexico Bar Exam

New Mexico Board of Bar Examiners

Follow this and additional works at: https://digitalrepository.unm.edu/law_nmbarexams

Recommended Citation

Board of Bar Examiners, New Mexico. "July 2009 New Mexico Bar Exam." (2009). https://digitalrepository.unm.edu/law_nmbarexams/20

This Exam is brought to you for free and open access by the School of Law at UNM Digital Repository. It has been accepted for inclusion in New Mexico Bar Exams (2000-2012) by an authorized administrator of UNM Digital Repository. For more information, please contact disc@unm.edu.

NEW MEXICO BAR EXAMINATION
JULY 2009

QUESTION NO. 4
(Answer this Question in Book No. 4)

Sally opened a business selling scooters. She properly incorporated the business with herself as the sole shareholder and director. The business entered into a five-year lease with Store Agent for the premises where the scooters are sold. One year into the lease, Sally decides that the scooter business is not all she thought it would be. She decides to close the business. She removes her inventory and transfers it to her boyfriend, Bob, who runs a bicycle business. Bob did not pay for this inventory. She moves out of the premises, has the phone and other utilities disconnected, and reports to the IRS that the business has no taxes due.

1. Was the corporation dissolved properly? Explain.
2. What causes of action, if any, may Store Agent bring against Sally or the corporation for the rent due pursuant to the lease, the grounds therefore, and the likelihood of success? Explain.
3. What causes of action, if any, may Store Agent bring against Bob for the rent due pursuant to the lease, the grounds therefore, and the likelihood of success? Explain.

4)

1) At issue is whether Sally properly dissolved her corporation. When corporations seek to dissolve they can do so either voluntarily or involuntarily through an action against the corporation, such as by a shareholder. In this case the action was voluntary. To effect a voluntary dissolution of a corporation generally the board of directors would take an action at either a regularly held meeting or a special meeting. In either case, notice would be required to be sent to the shareholders and a quorum of board directors would be necessary to take an effective action. In this case S is the only board member so she constitutes a quorum and she obviously had notice. Once a board takes an action that affects a fundamental corporate change which is what dissolution would be - the ultimate corporate change - then the shareholders must vote, and generally a vote affirming a board action of fundamental change requires a majority of all shares eligible to vote. In this case, since S was the only S she would have constituted a quorum of shareholders - the majority of shares - and she could have taken action affirming the board's direction. This is generally the way actions affecting a fundamental change in the corporation must be undertaken unless the corporation's articles filed with the secretary of state provide for something different. As a contract between the state and as a contract between the corporation and shareholders, the articles of incorporation determine the process for dissolution so long as they are in conformity with state law.

But dissolution is only the start of the corporate dissolution process. Before termination, there is a stage called winding up during which the corporation must gather its assets, liquidate its assets and pay off its creditors and shareholders with any surplus. Further, the board must notify the secretary of state and file the proper paperwork notifying the state of the corporation's dissolution and termination because when a corporation is formed it is presumed to be perpetual. So while Sally may have properly initiated the dissolution process she did not wind up by liquidating assets - she merely transferred them gratis to her boyfriend Bob - and did not pay off her creditors or herself as sole shareholder, nor did she file the proper paperwork with the state notifying them of the termination.

2) Store Agent (SA) has a cause of action against Sally's business because she left the rental property for which she agreed to a five-year lease. As a five year lease the lease is subject to the

statute of frauds meaning that there must have been a writing for proving the contract to lease the premises. Assuming there is one, and that SA had the authority in writing to enter into the lease under the equal dignities doctrine, then he has a cause of action against Sally's business for abandoning the premises. Under real estate law SA could either assume that Sally has abandoned her rent and seek to find a new tenant by retaking the premises, or SA could hold Sally's business accountable, seek a new tenant to finish her lease and hold her accountable for any deficiencies. It seems pretty clear that she has abandoned the lease given that she has disconnected the utilities and transferred her inventory. SA clearly has a cause of action against Sally's business as a corporate entity. Also at issue is whether SA can seek to pierce the corporate veil and pursue damages against Sally personally. There are several situations in which courts might seek to pierce the corporate veil. First it generally only is available against close corporations which is what Sally had being small, only one shareholder and not being traded on a national market. Courts also pierce the corporate veil when a business is under capitalized, when the incorporator is seeking to improperly limit her personal liability behind the corporate entity (alter ego theory) and when creditors would be denied remedy otherwise. In this case, all elements can probably be met allowing SA to pierce the corporate veil and seek recovery of damages against Sally personally assuming that he can establish the lease was signed in accord with the statute of frauds.

3) At issue in this question is whether SA can recover any damages from Bob as a result of Sally's breaching her assumed lease contract with SA. Because Sally did not fully terminate her corporate entity SA could try to argue that Bob can be seen as an agent of Sally's corporation, given that Bob has received her inventory and her corporate entity is still ostensibly in existence. As such, it could appear that Sally is attempting to sell her inventory through Bob rather than through her own corporation. But SA did not secure his lease to Sally through any means so did not attach an interest in her inventory, so has no real claim to the inventory that was removed to Bob's store. Further, Bob never entered into a contract with SA so there is no privity of contract between them nor is there privity of estate since Bob has his own store. The best argument SA could make is that Bob is acting as an agent for Sally or that they are acting in a general partnership capacity.

To argue agency, SA would have to establish that there is assent between Bob and Sally, that Bob is acting to benefit Sally and that Sally has some control over the manner in which Bob performs. This last element will be the most difficult for Bob to establish because this is his own bicycle business - it is more likely that he is selling the scooters through a consignment arrangement which does not allow SA to confirm agency between Bob and Sally. So he will likely fail on this argument. He will also probably fail trying to establish partnership which occurs when one or more people hold themselves out as co-owners of a business to make a profit. Here, there was no holding out as co-owners so establishing partnership would be difficult under these facts. Ultimately, SA's best course is to seek damages from Sally directly by attempting to pierce the corporate veil.

END OF EXAM