

STATE OF VERMONT WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT

DOCKET NO. S23-771Wnc

DENNIS J. SOLOMON, DEAN W. MELEDONES, PHILLIP SOLOMON, ROBERT ELDERIDGE,
WILLIAM D. MELEDONES and JULIUS GOODMAN, Plaintiffs

vs.

ATLANTIS DEVELOPMENT, INC., PATRICK E. MALLOY, III, Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW (Decision rendered March 23, 1981)

The above matter came on for hearing before the Washington Superior Court on February 19, 21, 22, 26, April 14, 15, 16, 17, 18, May 19, 20, 21 and 22, 1980. The Plaintiffs were represented at the hearings by Kimberly B. Cheney, Esquire, and James S Brock, Esquire. The Defendants were represented by Robert D. Rachlin, Esquire, and Robert A. Mello, Esquire.

BACKGROUND

- * 1. Atlantis Development, Inc. was incorporated as a Massachusetts corporation on February 6, 1973. It commenced doing business in Massachusetts, but in 1974 it moved its principal place of business to Waitsfield, Vermont.
- * 4. The principal business of Atlantis was the manufacture and sale of marine foul weather gear which had been designed principally by Solomon with help from Meledones and Mordecai and several individuals from the Alb Rubber Company (Alb).
- * 5. The product was of high quality and was well received among users of recreational sailboats.
- * 8. As an example of the high regard in which the Atlantis weather gear was held, the entire crew of the America's Cup boat "Courageous" purchased Atlantis weather gear for themselves in 1974 despite having been given competing products for free.
- 9. The crew members of the Australian challenger, "Southern Cross", also purchased Atlantis weather gear for themselves.
- * 10. Plaintiffs' complaint alleges that they bring the action for and in behalf of themselves as stockholders of Atlantis Development, Inc. The Plaintiffs fairly and adequately represent the interests of shareholders similarly situated in seeking to enforce the alleged right of Atlantis Development, Inc. to have rescission of-the transaction complained of.
- * 12. This action is properly brought by the Plaintiffs on their own behalf and on behalf of Atlantis Development, Inc., in their derivative capacity.
- * 20. In February or March of 1975, Defendant Patrick E. Malloy, III, came to Waitsfield, Vermont, with a friend [attorney Barbara Salken] who wanted to buy marine foul weather gear. Malloy was a highly successful speculator in commodities futures as well as a businessman operating out of Sag Harbor and East Hampton, Island. In 1975, he had earned income of over \$100,000 and had a net worth of somewhere between one million dollars and five million dollars.
- * 21. In 1975, Malloy was thirty-two years of age. He owned various business enterprises, including a real estate firm, a boat yard, and an interest in a condominium project. He was a graduate of Penn State University, where he had received a degree in Business Administration, majoring in accounting, in 1965.

- * 22. Following an expression of interest in Atlantis' product by Malloy, **Mordecai corresponded with Malloy, suggesting that Malloy invest in the company.** Malloy was receptive in May of 1975 the three principals of Atlantis traveled to East Hampton, Long Island for two separate meetings with Malloy.
- * 25. Following extensive negotiations, Malloy agreed to invest \$50,000 in the company in return for a 25% interest in its capital stock and a provision permitting him to maintain his 25% interest in the event the convertible debenture holders elected to convert their debentures into stock.
- * 76. During his sales trip, Solomon obtained an order from a marine mail order house, Goldberg's Marine Distributors of Philadelphia, for 550 Atlantis jackets and 400 pants. These were to be marketed under the private label of Goldberg, and the suits were to be altered slightly from those that Atlantis itself sold. The Goldberg suits would then be sold for a cheaper price than those sold by Atlantis. The total value of the order to Atlantis was approximately \$24,000.
- * 77. Solomon telephoned the order to Julius Goodman at Atlantis in Waitsfield on October 31. Goodman in turn consulted by telephone with Meledones and Mordecai who were then on their respective sales trips. None of the three thought that the ideal of selling private label goods was a good one since it might discourage sales of more expensive items under the regular Atlantis label. Mordecai instructed Goodman not to fill order.
- * 78. When Solomon learned of this action, he became very upset. He called Goldberg to apologize, and on November 1975, Solomon wrote a letter to the corporation resigning as an officer. In his letter he offered to sell his shares and all his interest in Atlantis for \$40,000. (Plaintiffs' Exhibit 3.50.)
- * 79. **On December 10, 1975, Mordecai submitted an offer from Malloy to Solomon to buy out Solomon's interest in Atlantis for \$17,000.** (Plaintiffs' Exhibits 3.80 and 3.81.) This offer was not acceptable to Solomon.
- * 82. On or about December 10, 1975, a call for a special meeting of stockholders and directors of Atlantis was sent out. The notice was worded as follows: "There will be a meeting of the Stockholders and Directors of Atlantis Development, Incorporated at its principal place of business, The Mad River Mill, Route 100B, Moretown, Vermont, on Monday, January 19, 1976, at 10:00 a.m. for the purpose of electing officers-and-directors of the corporation' and to conduct any other such business as may come before it." (Plaintiffs' Exhibit 4.01.)
- * 87. **At Malloy's request, Davis had prepared financial statements.**
- * 88. **A week or ten days before the meeting, Davis telephoned Malloy and told him that things had finally turned around-and that December it was quite profitable.**
- * 93. At the shareholders' meeting on January 19, 1976, Malloy opened the discussion by explaining his computations and conclusions as to the financial situation. Everyone at the meeting was disturbed to discover that Atlantis once again was in dire financial condition and unable to pay its bills without another outside infusion of cash. Everyone, including Davis, agreed that the financial records Davis had prepared were wrong and that Atlantis did indeed have a deficit in the order of \$30,000.
- * 94. Malloy informed the shareholders that he had had a call from the First National Bank of Boston stating that his letter of credit in the amount of \$20, 000 was to be exercised.
- (* * 72. Malloy knew, or could have learned through the exercise of an ordinary and prudent business practice, that letter of credit (Plaintiffs' Exhibit 3.10). could not have been exercised during week of January 19., 1976, and that the earliest that it could have been exercised was after demand made on February 17, 1976. Even then, it could not have been exercised for the full \$20,000.)

* 96. Malloy asked for payment of \$45,000 on his notes, which he stated were then due. (Actually, January 31, 1976).

* 97. Solomon asked that the meeting be recessed for ten days so that the books of the company could be checked and other solutions explored. Malloy and Mordecai objected to the ten-day request, and it was not approved.

* 98. Meledones requested a twenty-four-hour delay to review the situation and see what could be done. Malloy and Mordecai objected to this request, and it was not approved.

* 101. Finally, Mordecai asked Malloy whether he would be willing to buy the assets of Atlantis for \$1 plus assumption of; certain liabilities. Such a solution would assure that the creditors of Atlantis would be paid in full, including the debenture holders, who were friends and relatives of Solomon, Meledones and Mordecai. Such a solution would also give Malloy the option of either liquidating Atlantis in an effort to salvage as much of his investment as he could or continue Atlantis in business in the hopes that he could somehow make it profitable.

* 102. Solomon on asked for a ten-day postponement in the vote but none of the other three stockholders agreed to it because they believed that Atlantis' problems would not improve by delay and and because it might not be possible-to get the four stockholders back together again in ten days.

* 104. The proposal was then put to a vote. Meledones, Mordecai and Malloy voted in favor of the proposal. Solomon voted against it Subsequent to the meeting, Malloy had a detailed Purchase Agreement and a Bill of Sale prepared by his attorney which he and Mordecai signed. (Plaintiffs' Exhibits 5.03 and 5.04.)

* 107. Following the meeting of January 19, 1976, Malloy caused a new corporation to be formed under the name Atlantis Weathergear, Inc. The Certificate of Incorporation, dated January 23, 1976, was filed with the Secretary of State of the State of Delaware on January 30, 1976. (Plaintiffs' Exhibit 1.21.)

* 108. Malloy was the sole shareholder of Atlantis Weathergear, In purchasing the assets of Atlantis Development, Malloy obtained a significant tax advantage. He was able to take a tax loss on his Atlantis Development stock, writing off approximately \$25,000 against his income.

CONCLUSIONS OF LAW

* 1. Atlantis Development, Inc. was incorporated in Massachusetts. Its internal affairs are thus governed by the laws of that state. Rogers vs. Guaranty Trust Company, 288 U.S. 123, 130 (1933).

* 2. The Plaintiffs contend that the notice given of the January 1976, meeting, of stockholders was inadequate because it was not stated in the notice that one of the purposes of the meeting was to consider the sale of the assets of the corporation. There is no question but that both the Massachusetts Statutes (M.G.L.A. c. 156B, §§36 and 75) and the by-laws of Atlantis Development Inc-(Plaintiffs' (Plaintiffs' Exhibit 1.02) required that written notice.-of the purpose of the meeting be given prior to any stockholders meeting that was to consider and vote on a sale, of the assets of the corporation Inasmuch as such purpose was not specified in the notice given prior to the meeting of January 19, 1976, the action taken at that meeting - authorizing a sale of the assets to the Defendant, Patrick E. Malloy - is invalid absent a waiver of the notice. requirement or a ratification or validation of the action:- 18 C.J.S. Corporations, §545; M.G.L.A. c. 156B.

* 5. The Plaintiffs contend that the decision to sell the assets was made too precipitously, that the operation could have continued for a short period of time while the situation was studied and the books and records reviewed, and that the sale was made for inadequate consideration. The evidence shows that the idea to sell the assets was broached for the first time during the course of the meeting on

January 19, that the corporation could have maintained a holding pattern for a least 10 days until the notes came due and for considerably longer if they were not called, and that the actual value of the corporation was considerably more than the \$1 that was paid by Malloy for the assets. The burden is on the Defendants to demonstrate, among other things, that the purchase price was fair. *Godley v. Crandall and Godley Co.*, 105 NE 818 (I.Cy. Ct. of App., 1914). They have failed to meet this burden. The finding of the Court indicate that the value of Atlantis on January 19, 1976 was \$36,205. The sale for \$1, thus, was for a grossly inadequate sum. Inadequacy of price alone, however, is not sufficient ground for granting relief. The inadequacy must be so gross as to "display itself as a badge of-fraud." 8 C.J.S. Corporations, §515, pp. 1198-9. In this case, there is too great a disparity between \$1 and \$36,205. The Plaintiffs' are entitled to relief.