

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-2836
STATE OF WISCONSIN**

Cir. Ct. No. 99-CV-245

**IN COURT OF APPEALS
DISTRICT III**

BADGER ENTERPRISES, INC.,

PLAINTIFF-RESPONDENT,

V.

DEBRA L. HINESVENNIE,

DEFENDANT-APPELLANT,

**ESTATE OF ROBERT FRANZ, HENRIETTA FRANZ, ROBERT
POCIASK, SHIRLEY POCIASK, MATTHEW R. POCIASK
AND ZOLTAN KARASZY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Barron County:
EDWARD R. BRUNNER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Debra HinesVennie appeals a summary judgment in favor of the Franz defendants¹ and Zoltan Karaszy determining the corporate status of Badger Enterprises, Inc. Badger filed a complaint asking the court for a judgment declaring the number of Badger shares issued and outstanding and the name and address of the owner of each share. HinesVennie was among the many defendants, all of whom Badger thought might have an interest in the company.²

¶2 HinesVennie argues that the trial court did not determine Badger's ownership. At one point, the Franz defendants asked for a determination of beneficial interest, but they withdrew that request for relief in their summary judgment brief and asked the trial court to determine the essential issues raised in Badger's complaint and set forth in the scheduling order. Badger never amended its pleadings to have the court more broadly determine the corporation's ownership. The trial court construed the Franz defendants' brief as a motion for summary judgment. It determined that Badger was a duly incorporated company, that Karaszy was the sole director and that no shares were ever issued. We affirm the judgment.

¹ We refer to the Estate of Robert Franz, Henrietta Franz, Robert Pociask, Shirley Pociask and Matthew R. Pociask collectively as the Franz defendants. Henrietta Franz was Robert Franz's mother. She passed away in July 2000. Robert Pociask was Henrietta's brother and Robert Franz's uncle. Shirley is Pociask's wife, and Matthew is his son. These individuals and estates share common interests in the litigation and were commonly represented.

² The Franz defendants assert that HinesVennie initiated this action on Badger's behalf. While we do not know this to be true, HinesVennie's lack of an answer to the complaint and her position on appeal suggests the Franz defendants are correct.

BACKGROUND

¶3 Robert Franz, now deceased, engaged an incorporator³ to create Badger in accordance with WIS. STAT. ch. 180. The incorporator filed articles of incorporation for Badger with the Wisconsin Department of Financial Institutions on July 8, 1996. The incorporator adopted bylaws pursuant to WIS. STAT. § 180.0207 and, in lieu of the first meeting of shareholders, appointed Karaszy as sole director of Badger under WIS. STAT. § 180.0205(2).

¶4 As indicated, Badger initiated this lawsuit to obtain a declaratory judgment detailing the number of Badger shares issued and outstanding and the name and address of the owner of each share. The Franz defendants initially answered and counterclaimed for a ruling on whether certain defendants had “beneficial ownership.” Karaszy also answered the complaint. He confirmed that he was a director and shareholder of Badger and maintained that he never sold shares, resigned as a director or authorized anyone to act on his behalf.⁴ HinesVennie never answered the complaint, although she was also named as a defendant.

¶5 There are no formal records of the issuance of Badger stock. The trial court found that even if Franz expressed an intention to divide the company

³ WISCONSIN STAT. § 180.021 provides that “[o]ne or more persons may act as the incorporator or incorporators of a corporation.”

All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

⁴ Because the trial court found that no shares of Badger had been issued, Karaszy is not now and never was a shareholder. He is, however, the properly appointed sole director of Badger.

into shares and outlined the ownership percentages he desired, no action was ever taken to issue stock in accordance with WIS. STAT. ch. 180. Nor was any formal action taken pursuant to ch. 180 to transfer directorship or ownership. In any event, Franz was never an officer or director of Badger. He did not have the authority to issue its stock.

¶6 On June 26, 2000, the trial court issued a scheduling order that clarified three issues it would decide after briefing. Badger's complaint asked the court to resolve the following three issues: (1) whether Badger is a duly organized and presently existing corporate entity; (2) the names and identities of the current officers; and (3) the names and identities of any current shareholders.

¶7 The court decided to treat the Franz defendants' brief on these three issues as a motion for summary judgment.⁵ In their brief, the Franz defendants effectively withdrew their counterclaim and asked the court to limit its decision to answering the three questions set forth in the scheduling order.

¶8 Badger opposed summary judgment.⁶ It argued that summary judgment was not appropriate because there were disputed facts, especially

⁵ When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.

⁶ HinesVennie did not file a summary judgment brief. Instead, she submitted an affidavit claiming that she was an officer, director and agent of Badger. Her affidavit stated that Robert Franz had de facto control of Badger and possession of all corporate documents. HinesVennie conceded that Badger never issued stock and that there was never a meeting of shareholders or the board of directors. She nevertheless said that Franz directed his agent to issue stock and detailed Franz's intentions regarding Badger. We conclude that HinesVennie's affidavit was speculative and did not create a dispute of material fact precluding summary judgment. In fact, as indicated, she agrees with the trial court that Badger never issued stock.

regarding the identity of the shareholders Robert Franz intended. However, Badger conceded in its brief that Badger never issued stock certificates. Badger maintained that even if the court answered the three questions, that would not resolve the issue of who actually owned the corporation and its assets.

¶9 The trial court found: “The corporation has been properly incorporated and does exist. However, there are no shareholders and the only director is Zoltan Karaszy. There are no signed and delivered stock certificates to any party.” The court stated that there is “no evidence to support the contention that stock was officially, properly and statutorily issued in this corporation.” It further commented that “[w]ithout following the proper statutory procedure for the issuance and delivery of stock certificates, there can be no stock issue.” HinesVennie appeals.⁷

DISCUSSION

¶10 HinesVennie breaks down her argument into two issues. She argues that “the trial court erred in failing to grant a declaratory judgment determining the ownership interests in BEI,” and “alternatively, the trial court’s order did not resolve all of the issues before the court.” However, she is essentially contending that the trial court erred because it did not decide who owned the corporation and its assets. We disagree. We conclude that the court answered the parties’ questions. Further, we conclude that the court answered those questions correctly.

¶11 HinesVennie claims that she has an ownership interest in Badger. She offers as evidence a letter in which Karaszy purportedly resigns as a Badger

⁷ We decide this appeal on its merits rather than on HinesVennie’s standing to appeal.

director and that implies she was to replace Karaszy as a director. HinesVennie also offers a consent resolution of the Badger board identifying both her and Karaszy as directors and a DFI annual report in which she represented herself and her husband as Badger officers.

¶12 However, we conclude that the issue of Badger's beneficial ownership was not before the trial court. The court afforded Badger the only relief it ever formally requested in a pleading. The court answered the three questions it gleaned from the complaint and outlined in the scheduling order. Badger raised an objection in its trial court response brief. But it has not demonstrated that it had the right to insist that the Franz defendants prosecute their initial counterclaim that Robert and Henrietta Franz be declared Badger's beneficial owners, i.e., that the trial court determine who the beneficial owners were. The Franz defendants effectively withdrew that counterclaim, and Badger never amended its pleadings to ask the court to decide ownership of the corporation and its assets. The court properly limited its decision to the relief requested by the parties. *See Waushara Cty. v. Graf*, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992).

¶13 We conclude, as did the trial court, that the incorporator properly formed Badger, in accordance with WIS. STAT. ch. 180, by filing articles of incorporation, adopting bylaws and appointing Karaszy as a director. WIS. STAT. § 180.0202, 180.0205, 180.0206. We also conclude that Badger never validly issued stock.

¶14 WISCONSIN STAT. § 180.0621⁸ sets forth the corporate action necessary to issue stock. Section 180.0621(2) allows the board of directors to

⁸ WIS. STAT. § 180.0621 provides:

(continued)

authorize shares of the corporation to be issued for consideration. Section 180.0621(3) requires that the board determine adequate consideration to be received for the shares before the corporation issues the shares. The shares are fully paid for when the corporation receives the consideration for which the board authorized the issues of shares. WIS. STAT. § 180.0621(4). Here, none of this occurred. Karaszy was and is Badger's sole director. He did not issue shares of the corporation following this process or any other.

(1) The powers granted in subs. (2) to (5) to the board of directors may be reserved to the shareholders by the articles of incorporation.

(2) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed or other securities of the corporation.

(3) Before the corporation issues shares, the board of directors shall determine that the consideration received or to be received for the shares to be issued is adequate. The board of directors determination is conclusive insofar as the adequacy of consideration for the issuance of shares relates to whether the shares are validly issued, fully paid and nonassessable.

(4) When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued for that consideration are fully paid and nonassessable.

(5) The corporation may place in escrow shares issued for a contract for future services or benefits or a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the benefits are received or the note is paid. If the services are not performed, the benefits are not received or the note is not paid, the corporation may cancel, in whole or in part, the shares escrowed or restricted and the distributions credited.

¶15 HinesVennie contends that Robert Franz directed his agent to issue shares. Franz was not a director. He had no authority to issue Badger shares. Even if Franz attempted to issue stock, it was not officially, properly and statutorily issued. Any stock certificates Franz issued were not authorized. Nor did they comply with the statutory requirements for share certificates. *See* WIS. STAT. § 180.0625.

¶16 HinesVennie never asked the trial court to declare her an owner. She cannot now complain that the trial court ultimately did what it was formally asked to do: answer the three questions. *See Graf*, 166 Wis. 2d at 451. The court properly concluded that Badger never properly issued stock to anyone so there *are* no shareholders. Therefore, HinesVennie cannot be a Badger shareholder.

¶17 Upon the court's holding that Karaszy was the sole director, the trial court properly dismissed the suit because Karaszy had not authorized the action. He would be the only person authorized to bring suit on Badger's behalf. *See* WIS. STAT. § 180.0302(1).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE § 809.23(1)(b)5.

