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2019 IL App (5th) 180469-U

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 5-18-0469

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

BEAR’S LIQUOR, INC., and JASON ROWELL,)	Appeal from the
)	Circuit Court of
Plaintiffs,)	Marion County.
)	
v.)	No. 17-CH-90
)	
TRAVIS ETHERIDGE,)	
)	
Defendant-Appellee)	Honorable
)	Michael D. McHaney,
(Bear’s Liquor, Inc., Plaintiff-Appellant).)	Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.
Presiding Justice Overstreet and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held:* A majority of a corporation’s board of directors, although less than a quorum, legally filled a vacancy on the board of directors as provided by the plain language of the corporation’s bylaws concerning the filling of vacancies on the board of directors. After the vacancy was filled, a quorum of directors authorized the corporation’s lawsuit against the defendant. Therefore, the circuit court erred in granting the defendant’s motion to dismiss the corporation’s lawsuit on the basis that the lawsuit was brought *ultra vires*.

¶ 2 The plaintiff, Bear’s Liquor, Inc., is an Illinois corporation in the business of operating a bar and video gaming establishment in Centralia, Illinois. The defendant, Travis Etheridge, was a 50% stockholder of Bear’s Liquor, as well as its president,

treasurer, and a member of its board of directors. Bear's Liquor brought an action against Etheridge alleging causes of action based on breach of fiduciary duty and conversion. In the same complaint, plaintiff, Jason Rowell, who is a 50% stockholder in the corporation, also filed claims against Etheridge. Rowell's claims are not at issue in this appeal. Etheridge moved to dismiss Bear's Liquor's claims pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2016)), arguing that the corporation's claims against him were filed without authorization of a quorum of the board of directors as set forth in the corporation's bylaws. The circuit court agreed and dismissed Bear's Liquor's claims. Bear's Liquor now appeals the dismissal. For the following reasons, we reverse and remand for further proceedings.

¶ 3

BACKGROUND

¶ 4 Bear's Liquor was originally owned by Etheridge's parents. In December 2013, Rowell and Etheridge each purchased 50% of the corporation's outstanding stock (50 shares each), resulting in Rowell and Etheridge collectively owning 100% of the corporation's stock. Etheridge served as the corporation's president and treasurer and Rowell as its secretary. The bylaws of Bear's Liquor provided that the "business of the corporation shall be managed by or under the direction of its board of directors." The bylaws also stated that the number of directors "shall be two." Under the bylaws, a majority of the directors, *i.e.*, two, must be present at a meeting of the board of directors "for transaction of business." Rowell and Etheridge each served as the corporation's only directors.

¶ 5 Sometime around March 2017, Rowell became concerned that proceeds from the business were not being deposited in the company's bank account. Rowell investigated his concerns and concluded that Etheridge had misappropriated thousands of dollars from the business. In addition, Rowell believed that Etheridge engaged in acts of misconduct, including allowing minors into the corporation's establishment, serving patrons alcohol without charging them, and making improper sexual advances towards a bar employee. Rowell also believed that Etheridge was taking steps to open a competing video gaming establishment. As a result, Rowell demanded that Etheridge resign as an officer and director of Bear's Liquor.

¶ 6 Article III, section 9 of Bear's Liquor's bylaws provided that a director may resign at any time upon written notice to the board of directors. On October 16, 2017, Etheridge gave written notice of his resignation as a director of Bear's Liquor. Article II, section 2 of the corporation's bylaws authorized the president of the corporation to call special meetings of the shareholders of the corporation. Etheridge, as president of Bear's Liquor, called a special meeting of the shareholders which took place on the same day of his resignation as a director. The stated purpose of the special meeting was to "fill the vacancy in the position of Director of the Corporation occasioned by the resignation of Travis Etheridge."

¶ 7 The minutes of the October 16, 2017, special meeting state that Etheridge nominated his mother, Robbyin Etheridge, to be elected as a director of the corporation until the next annual meeting. Etheridge voted in favor of Robbyin serving as a director, and Rowell voted against the nomination. Accordingly, the minutes state that "[t]he

nomination failed and Robbyn Etheridge was not elected as a director of the Corporation. No other nominations were made by either of the Corporation's shareholders." The minutes also state that Etheridge tendered his resignation as the corporation's president and treasurer. The meeting adjourned, leaving a vacancy on the corporation's board of directors and vacancies for the corporation's president and treasurer.

¶ 8 Article III, section 8 of the corporation's bylaws set out the procedure for filling vacancies on the board of directors with the following language:

"Any vacancy on the board of directors may be filled by election at the next annual or special meeting of shareholders. *A majority of the board of directors may fill any vacancy prior to such annual or special meeting of shareholders.*"

(Emphasis added.)

¶ 9 After Etheridge's resignation, Rowell, by himself, constituted a majority of the remaining board of directors. On October 23, 2017, Rowell held a special meeting of the corporation's board of directors. The minutes of this October 23, 2017, special meeting state that, pursuant to article III, section 8 of the bylaws, the board of directors unanimously elected Barbara Rowell to fill the position of director. The meeting then adjourned. On that same day, Rowell and the new director, Barbara, held another special meeting of the board of directors. The minutes of this second October 23, 2017, special meeting state that the board of directors appointed Jason Rowell to serve as Bear's Liquor's president and treasurer.

¶ 10 On October 31, 2017, Etheridge sold his 50% interest in the corporation to his mother.

¶ 11 On November 1, 2017, the board of directors held another special meeting in which Rowell and Barbara were present. The minutes of this special meeting state that the directors “approved to proceed with litigation against Mr. Etheridge.”

¶ 12 On December 20, 2017, Rowell and Bear’s Liquor filed their complaint against Etheridge. In counts I and IV of the complaint, Bear’s Liquor alleged causes of action against Etheridge based on breach of fiduciary duty and conversion. In counts II, III, and V, Rowell individually alleged causes of action against Etheridge for breach of fiduciary duty, breach of contract, and breach of duty of loyalty. Rowell’s claims against Etheridge are not at issue in this appeal.

¶ 13 Etheridge filed a motion to dismiss counts I and IV of the complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)). In his motion, Etheridge argued that the corporation’s lawsuit was not authorized by “a duly constituted Board of Directors.” Etheridge cited article III, sections 6 and 7 of the corporation’s bylaws in support of his position. Section 6 provided:

“A majority of the number of directors fixed by these by-laws shall constitute a quorum for transaction of business at any meeting of the board of directors, provided that if less than a majority of such number of directors are present at said meeting, a majority of the directors present may adjourn the meeting at any time without further notice.”

¶ 14 Section 7 of the bylaws provided:

“The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by statute, these by-laws, or the articles of incorporation.”

¶ 15 Etheridge argued that the appointment of Barbara Rowell as a director was unlawful under the bylaws because there was not and could not have been a quorum of directors at the meeting in which Barbara was elected as a director. Etheridge argued that, under the bylaws, a quorum of directors required two directors and that any action of the board at a meeting in which a quorum was not present was not a valid action of the board. Therefore, according to Etheridge, no lawful action could be taken by Bear’s Liquor, including filling the vacancy on the board and the filing of a lawsuit, until the vacancy on the board of directors was lawfully filled and corporate officers were lawfully appointed.

¶ 16 The circuit court granted Etheridge’s motion and dismissed Bear’s Liquor’s claims and denied Bear’s Liquor’s motion to reconsider, making a finding that the order was final pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). Bear’s Liquor now appeals the circuit court’s dismissal of its claims.

¶ 17 ANALYSIS

¶ 18 The only issue before us concerns whether Bear’s Liquor’s board of directors properly brought its action against Etheridge pursuant to authority provided by the corporation’s bylaws. Resolution of this issue requires us to interpret the corporation’s bylaws to determine whether Barbara Rowell was properly appointed to the board of directors following Etheridge’s resignation. If so, Bear’s Liquor’s complaint against

Etheridge was properly authorized by a quorum of its board of directors and the circuit court erred in dismissing it.

¶ 19 The issue is presented to us on appeal from the circuit court’s dismissal pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)). An appeal from a section 2-619 dismissal is also subject to *de novo* review. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004). We also note that the issue involves the interpretation of a corporation’s bylaws which is a question of law that is subject to *de novo* review. See, e.g., *Lo v. Provena Covenant Medical Center*, 342 Ill. App. 3d 975, 982 (2003) (holding that interpretations of bylaws, regulations, and statutes are questions of law subject to *de novo* review).

¶ 20 A section 2-619 motion “raises defects, defenses or other affirmative matter which appears on the face of the complaint or is established by external submissions which act to defeat the plaintiff’s claim.” *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584 (2000). “[A] section 2-619 proceeding enables the court to dismiss the complaint after considering issues of law or easily proved issues of fact.” *Id.* at 585. As we explained, the “affirmative matter” that Etheridge raised in his 2-619(a)(9) motion was interpretation of the corporation’s bylaws.

¶ 21 A corporation’s bylaws constitute an enforceable contract between the corporation and its shareholders. *Kern v. Arlington Ridge Pathology, S.C.*, 384 Ill. App. 3d 528, 532 (2008). The “words of corporate bylaws are to be interpreted in their ordinary, popular sense.” *Maimon v. Sisters of the Third Order of St. Francis*, 120 Ill. App. 3d 1090, 1096 (1983). In the specific context of defining the rights and responsibilities of shareholders

with respect to a corporation, “the plain language of a corporation’s bylaws is to be enforced [because] it is reasonable to believe the shareholders who took their shares in reliance on the bylaws intended the requirements of the bylaws as written.” *Kern*, 384 Ill. App. 3d at 532-33.

¶ 22 Here, the corporation’s bylaws provided that there “shall be two” directors on the board of directors. The bylaws defined a quorum of directors with the following language: “A majority of the number of directors fixed by these by-laws shall constitute a quorum for transaction of business at any meeting of the board of directors.” This plain language means that a “quorum” of directors for this corporation requires two directors. Under these bylaws, there is no scenario in which one director qualifies as a quorum of directors. Accordingly, after Etheridge resigned as a director, it was not possible for there to be a quorum of directors at any meeting because only one director (Rowell) remained. On appeal, neither party disputes the plain meaning of the term “quorum” as defined in the bylaws, and they agree that there could not be a quorum of directors at any meeting of the directors after Etheridge resigned. The parties’ dispute centers on whether the bylaws required a quorum of directors for the limited purpose of appointment of Barbara as Etheridge’s successor on the board under article III, section 8 of the bylaws.

¶ 23 Etheridge directs us to article III, section 7 of the bylaws which states that “[t]he act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors.” Etheridge argues that Barbara was not elected to the board of directors at a meeting at which a quorum was present. Therefore, her election to the board of directors was not valid and any action taken by the board after Barbara’s

appointment violated the corporation's bylaws, including the filing of the claims against him.

¶ 24 Bear's Liquor, however, directs us to article III, section 8, and argues that this section is the specific provision in the bylaws for filling vacancies on the board. Section 8 states that "[a]ny vacancy on the board of directors may be filled by election at the next annual or special meeting of shareholders. *A majority of the board of directors may fill any vacancy prior to such annual or special meeting of shareholders.*" (Emphasis added.)

¶ 25 Bear's Liquor argues that, under section 8, a quorum of directors is not necessary to fill a vacancy on the board of directors. Instead, section 8 requires only "a majority of the board of directors," and after Etheridge resigned, a majority of the board of directors equaled one director. Therefore, Bear's Liquor argues, Rowell constituted a majority of directors after Etheridge resigned, and, pursuant to section 8, he legally filled the vacancy on the board on October 23, 2017. We agree with Bear's Liquor's construction of the bylaws.

¶ 26 Section 8 is the specific section in the bylaws which provides for filling vacancies on the board. Under the plain language of section 8, a "majority of the board of directors" may make this appointment. The plain language of section 8 does not define this authority with the use of the term "quorum." We find this significant because the bylaws clearly specify when a quorum is required in other sections of the bylaws, but with respect to the specific section for filling vacancies on the board, section 8 requires only a "majority of the board of directors." Had the shareholders intended for the bylaws to require a quorum for the filling of vacancies on the board of directors, they would have

used that term in section 8 as they used it in sections 6 and 7. They did not, and we are not authorized to rewrite the language of section 8 to add that term to the bylaws to alter the meaning of its plain language.

¶ 27 Accordingly, we conclude that Barbara Rowell was properly elected to fill the vacant position on the board of directors on October 23, 2017, pursuant to section 8 of the bylaws. This is the only interpretation of section 8 that is consistent with its plain language. Because Barbara was properly elected to the board of directors, a quorum of directors subsequently authorized the filing of Bear’s Liquor’s claims against Etheridge at the November 1, 2017, special meeting of the directors.

¶ 28 In reaching this conclusion, we find *Continental Television Corp. v. Caster*, 42 Ill. App. 2d 122 (1963), to be persuasive. In that case, the issue concerned whether a Delaware corporation legally terminated a contract. *Id.* at 132. Resolution of that issue, in turn, required the court to determine whether a majority of directors, which were less than a quorum, were authorized to appoint a vacancy on the board of directors. The corporation’s bylaws provided for six directors and that a majority of the directors constituted a quorum. *Id.* at 133. Therefore, in that case, a quorum would be four directors. In addition, like the bylaws in the present case, the bylaws in *Continental Television Corp.* provided that “ ‘the act of a majority of the directors at which there is a quorum shall be the act of the board of directors.’ ” *Id.* At a board meeting in which three directors appeared, the board accepted the resignation of a fourth director and the three directors in attendance at the meeting then filled the vacancy on the board. On appeal, the court had to determine whether the filling of the vacancy by three directors was valid

when three directors did not constitute a quorum but constituted a majority of the remaining directors. *Id.* at 132.

¶ 29 In its analysis, the court first noted that “[a]t first blush it would appear that *** the action of the three directors in filling the vacancy was done without a quorum of four present.” *Id.* at 133. However, the court held that the vacancy, nonetheless, was properly filled by a majority of the directors that remained on the board after the resignation. The court noted Delaware’s statutory provision which provided, in part, that vacancies on a corporation’s board of directors “may be filled by *a majority of the directors then in office*, though less than a quorum, unless it is otherwise provided in the certificate of incorporation or the by-laws ***.” (Emphasis added and internal quotation marks omitted.) *Id.*

¶ 30 In the present case, Bear’s Liquor was organized under Illinois’s laws, not Delaware’s. However, we believe *Continental Television Corp.* supports our construction of Bear’s Liquor’s bylaws and that the use of the language “a majority of the board of directors” allows for the appointment of a director without a quorum of directors.

¶ 31 Also we note that section 8.30 of the Business Corporation Act of 1983 provides: “Any vacancy occurring in the board of directors *** may be filled by election at an annual meeting or at a special meeting of shareholders called for that purpose; provided, however, *the by-laws may provide a method for filling vacancies* arising between meetings of shareholders *** by director *** action ***.” (Emphasis added.) 805 ILCS 5/8.30 (West 2016).

¶ 32 Here, as we have explained, Bear’s Liquor’s bylaws provided a method for filling vacancies arising between shareholder meetings, and the language used allowed a “majority of the board of directors” to fill the vacancy without reference to a quorum of directors. Bear’s Liquor’s shareholders could have required a quorum of directors to fill the vacancy, but they did not.

¶ 33 Finally, we note that construction of section 8 to require a quorum would render the language in section 8 superfluous with respect to filling a vacancy by a “majority of the board of directors.” With a two-person board of directors, after the resignation of one director, it would be impossible for a quorum of directors to fill the vacancy. “[B]y-laws, like statutes, should be construed, if possible, so that no clause or sentence is rendered superfluous.” *Wigod v. Chicago Mercantile Exchange*, 141 Ill. App. 3d 129, 132 (1986). This language in section 8 would have no purpose if the bylaws required a quorum of directors to fill the vacancy prior to the next annual meeting or special meeting of the shareholders.

¶ 34 For these reasons, we believe the circuit court erred in dismissing Bear’s Liquor’s claims against Etheridge on the basis that the corporation brought the claims *ultra vires*. Barbara was properly elected to fill the vacancy on the board of directors, and after her election, a quorum of directors properly authorized Bear’s Liquor’s lawsuit.

¶ 35 Etheridge argues, alternatively, that the issue on appeal is moot because Barbara’s vacancy appointment was only valid until the next annual meeting of the shareholders, which was to take place the first Tuesday in April 2018. He notes that the bylaws provided that a director holds office “until the next annual meeting of shareholders; or

until his successor shall have been elected and qualified.” We disagree with the defendant’s argument that the issue is moot.

¶ 36 The only issue before us on appeal is whether Bear’s Liquor’s claims against Etheridge were authorized by the corporation’s board of directors *at the time* the claims were filed. The issue before us does not concern any business of the corporation other than that narrow issue. Whether Barbara remained on the board of directors after the meeting in which a quorum of directors authorized this lawsuit, or for how long, has no bearing on the issue before us on appeal. Nothing in the record suggests that the board of directors had withdrawn its authorization to proceed with this litigation. Any issues arising from what may have or may not have happened after November 1, 2017, were not a basis for the circuit court’s ruling and are not otherwise at issue in this appeal.

¶ 37 The circuit court improperly granted the motion to dismiss on the basis that Bear’s Liquor’s lawsuit was filed without proper authorization by the corporation’s board of directors. For the reasons we have explained, the board of directors of Bear’s Liquor authorized this lawsuit against Etheridge on November 1, 2017. Accordingly, we reverse the circuit court’s order granting Etheridge’s motion to dismiss and remand for further proceedings on counts I and IV of the complaint.

¶ 38 **CONCLUSION**

¶ 39 For the foregoing reasons, we reverse the order of the circuit court dismissing counts I and IV of the complaint and remand for further proceedings.

¶ 40 Reversed; cause remanded.