

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF VENTURA

COURTROOM 32

HON. JOHN J. HUNTER, JUDGE

SIMI VALLEY LE PARC HOMEOWNERS  
ASSOCIATION,

Plaintiffs,

vs.

ZM CORPORATION dba QWIKRESPONSE,  
etc., et al.,

Defendants.

No. CIV159037

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Friday, January 29, 1999

APPEARANCES:

For the Plaintiffs:

JAMES P. LINGL  
Attorney at Law

For the Defendants:

PATRICK LOUGHMAN  
GLENN J. CAMPBELL  
Attorneys at Law

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1 VENTURA, CALIFORNIA; FRIDAY, JANUARY 29, 1999; A.M. SESSION

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5 THE COURT: Simi Valley Le Parc versus ZM Corporation,  
6 request for a temporary restraining order and the appointment  
7 of a receiver.

8 MR. LINGL: Your Honor, may I approach the bench?

9 THE COURT: All right.

10 MR. LOUGHMAN: Patrick Loughman for the petitioner.

11 MR. CAMPBELL: Morning, Glenn Campbell; Lowthorp,  
12 Richards for the petitioner and defendant and applicant.

13 THE COURT: Okay. Let me just read the... Well, I'd  
14 like to know what the whole array of less drastic alternatives  
15 are available. What would that be?

16 MR. LINGL: Writs of garnishment, writs of attachment  
17 on association bank accounts.

18 THE COURT: I don't think so. The assets of a  
19 corporation essentially are -- the income of a homeowners  
20 association is its dues; right?

21 MR. LINGL: It's the assessments, yes, your Honor.

22 THE COURT: Well, then, the only way they can get their  
23 assessments if they aren't voluntarily turned over is to  
24 appoint a receiver and have him collect them. How else are  
25 they going to get them?

26 MR. LINGL: Well, your Honor --

27 THE COURT: A writ wouldn't do any good. There is no  
28 funds from which to execute on.

1           MR. LINGL: Your Honor, there is, in fact, a fund.

2           There is an association bank account that is subject to levy.  
3           There have, in fact, been payments made to the creditor out of  
4           funds of the association.

5           There is a writ of garnishment that could be  
6           issued as to each homeowner, telling them that as their  
7           assessments -- as they pay their assessments, they're to be  
8           paid to the court.

9           I mean, the problem here is that this is a  
10          functioning community association. It operates with a  
11          voluntary, non-profit board of directors. There is no showing  
12          anywhere that these guys are likely to take off and run away  
13          with anything. This Court could certainly fashion an order --  
14          and I brought with me a copy of the bankruptcy court's order  
15          in which the association has been operating for more than a  
16          year, which basically says okay --

17          THE COURT: Then how much during that year has the  
18          corporation paid over?

19          MR. LINGL: I don't know the answer to that, your  
20          Honor, because I only came into this matter in August,  
21          September.

22          THE COURT: How much have they paid in the last year?

23          MR. CAMPBELL: Your Honor, we were able, at an early  
24          stage, to collect \$103,000.

25          THE COURT: How did you collect it?

26          MR. CAMPBELL: Early on. It was a fund that was frozen  
27          by the bankruptcy court in order to be paid over to the  
28          creditor. And this was just a separate fund, it wasn't the

1 assessments at all.

2 THE COURT: So the bankruptcy order didn't do any good?

3 MR. CAMPBELL: No, your Honor.

4 MR. LOUGHMAN: That's why we are here, too. We have had  
5 the Chapter 11 account control things, that's why Judge Mund  
6 says you guys stay still and ZM, you have three days to go to  
7 court and get your remedies, because we have had the  
8 protection of the US trustee and the bankruptcy court to  
9 supervise this whole mess, and now we are coming to state  
10 court to make sure we have the same type of protection with  
11 the receiver. And I believe it's essential.

12 MR. LINGL: Your Honor, I have absolutely no problem  
13 with having the Court issue appropriate orders to make sure  
14 that this association does not dissipate funds or anything  
15 else.

16 The existing Court order, for instance, the  
17 bankruptcy court order prohibited the board of directors from  
18 executing any contract or extending any sum in excess of  
19 \$1,000 without prior court approval. All that's appropriate.  
20 I mean, that makes some sense.

21 The problem here -- and this is what I tried to  
22 point out in these papers -- is this association has got an  
23 income of roughly a little over half million a year. Of that  
24 \$300,000 or more is spent simply on utilities and on  
25 insurance. Now, no receiver is going to be able to change  
26 those things.

27 THE COURT: Well, that may be true.

28 MR. LINGL: So the question then becomes what benefit

1 does the petitioner here receive by putting a receiver in?

2 And contrary-wise, who gets hurt and how?

3 Your Honor --

4 THE COURT: Well, this is going to kill the people in  
5 the association, but I assume in the last year there is some  
6 kind of a plan to pay this off.

7 MR. LINGL: Your Honor, there have been multiple plans  
8 proposed. I mean -- and I don't think you are really  
9 interested in knowing the waste of time that's been involved  
10 in negotiations in an attempt to settle this thing.

11 The point, however, is that this is not an  
12 appropriate case for a receiver.

13 THE COURT: I think it's perfectly appropriate. In  
14 fact, it looks to me like it's probably the only remedy, there  
15 having been nothing done voluntarily here.

16 The motion is granted.

17 MR. LOUGHMAN: I have a proposed order, your Honor.  
18 May I approach?

19 MR. CAMPBELL: For the record, your Honor, we have  
20 given a copy of the order to counsel.

21 THE COURT: Just out of curiosity, what do you plan to  
22 do?

23 MR. CAMPBELL: Good question, your Honor. What we plan  
24 to do is stand in the shoes of the association's manager to  
25 make sure that the assessments are collected and are protected  
26 and to police those defaults as required by the CC & Rs and by  
27 law.

28 THE COURT: Well, let's assume everybody is paying

2           1       their monthly association dues. You just going to scoop up  
2           2       all the funds?

3                   MR. CAMPBELL: I sure am.

4                   MR. LOUGHMAN: I am sure if there are any applicable  
5       exceptions, Mr. Lingl will vigorously raise them. So I  
6       anticipate the Court will set an OCS confirmation of our  
7       receiver at the appropriate time. And I think it's ten days  
8       or fourteen days or whatever and they have an opportunity to  
9       raise any such things.

10                   But our position is, your Honor, absent any  
11       exception, we plan to collect the money to satisfy our  
12       judgment.

13                   THE COURT: Well, that's what I was really asking.

14                   MR. LOUGHMAN: Yes, that's our plan.

15                   THE COURT: Because there will come a day when all the  
16       lights will go out over there.

17                   MR. LINGL: Your Honor, if I may. Before we actually  
18       leave this, I am not aware of and I was not privileged to  
19       receive all of the pleadings here, so I have no idea what kind  
20       of compensation Mr. Becker is supposed to be receiving.

21                   THE COURT: There is not a set compensatory rate. Do  
22       you know what his rate is?

23                   MR. LOUGHMAN: Your Honor --

24                   THE COURT: That's a good question.

25                   MR. LOUGHMAN: My understanding is that I have  
26       described this situation, he is reviewing it, he has agreed to  
27       do it based on these facts and he indicated his fee would be  
28       approximately \$1500 a month. I believe that would be subject

2           1       to Court confirmation in any event.

2                   THE COURT:   It would be.

3                   MR. LINGL:   And that's \$1500 on top of the  
4       association's obligation to pay all its existing contracts?  I  
5       mean --

6                   MR. LOUGHMAN:  I am sure this is an additional cost.

7                   THE COURT:  Right, it is a cost to the judgment  
8       creditor -- debtor.

9                   MR. LINGL:  And, your Honor, as I read the order, it  
10      will require the receiver basically to continue making all  
11      payments to all creditors, continue to take care of the  
12      development, and all of those items that are required of the  
13      association under the C C & Rs and the statute.

14                   Is that the way the Court intends this order to  
15      be?

16                   THE COURT:  Right, that's the order.

17                   MR. LINGL:  Well, then, really, all this is, this is an  
18      attempt to bully a whole bunch of homeowners out in Simi  
19      Valley.

20                   THE COURT:  Sure it is.  I recognize that.

21                   MR. LINGL:  Well, your Honor, it's not their debt.

22                   MR. LOUGHMAN:  We are a judgment creditor seeking to  
23      collect our judgment.  This is an appropriate remedy, not a  
24      matter of bullying.

25                   THE COURT:  Okay.  There is no place for the setting of  
26      a bond.  What's the monthly collections?

27                   MR. LINGL:  Approximately \$50,000.

28                   THE COURT:  I require a bond for two months' worth, so

2           1       he's going to have to post \$100,000 bond.

2                   MR. LINGL: What role, your Honor, will the board of  
3       directors have at this point? None?

4                   THE COURT: No. They are ordered to turn over all the  
5       books and records and management to the receiver.

6                   MR. LINGL: So they are divested of any authority to  
7       act?

8                   THE COURT: That is right.

9                   MR. LINGL: I am not arguing. I am asking for a  
10      clarification.

11                  THE COURT: That's right. You are right.

12                  MR. LINGL: Okay.

13                  THE COURT: Actually, it could work smoother than that.  
14      The receiver could take the sole responsibility for the income  
15      and distribute the expenses with the present management.

16                         There is a management company, I assume?

17                  MR. LINGL: Emmons.

18                  THE COURT: But those people now need to talk to the  
19      receiver to determine if they will continue, you know, on  
20      their daily basis.

21                  MR. LINGL: Your Honor, the Emmons Company is merely a  
22      financial only management company. So all they're doing is --

23                  THE COURT: Well, how do they take care of the  
24      property?

25                  MR. LINGL: Board of directors itself does that.

26                  THE COURT: By hiring people to do it?

27                  MR. LINGL: By having contractors just the same as a  
28      management company.

2           1           THE COURT: Well, the board needs to discuss all of  
2           that with the receiver to decide what management will  
3           continue. It doesn't look like they're going to get paid, so  
4           I doubt if anybody is going to continue. Because it looks  
5           like the receiver is going to scoop up everything.

6           MR. LINGL: Well, that's clearly the stated purpose of  
7           this.

8           THE COURT: Well, unfortunately, the dues as presently  
9           allocated are only to cover the expenses, not to cover this  
10          judgment. So they're going to have to raise the dues in order  
11          to cover the judgment.

12          MR. LINGL: Well, your Honor, there was a plan  
13          proposed, there was a plan proposed in bankruptcy court which  
14          would have done that over a period of time and we never got a  
15          chance to have that plan developed.

16          THE COURT: Well, I don't want anyone to stop working  
17          on this. Even though it is true it is not the homeowners'  
18          debt, it is also true that the homeowners indirectly have to  
19          pay this because that's the only source of funding; therefore,  
20          somebody's going to have to fork it up.

21          MR. LINGL: Well, your Honor, if I were the XYZ Widget  
22          Company standing here before you and I had inventory and  
23          things like that, this would be appropriate to put in a  
24          receiver to make sure the inventory wasn't dissipated, wasted,  
25          and it was liquidated and whatever assets could be recovered  
26          from that are going to be given to the creditor.

27                  That's not what we have here. If I were the XYZ  
28          Widget Company, your Honor, I could simply turn around

3           1       tomorrow and dissolve the corporation at which point the  
2           2       liquidation would go forward, whatever assets the association  
3           3       or the corporation had would be paid to the creditor,  
4           4       everybody would walk away happy. Done. Finished.

5                       By putting a receiver in, we are just so  
6           6       complicating what is already a complicated affair. And, your  
7           7       Honor, I hate to argue with judges, but there really are other  
8           8       options they really could be coming --

9                       THE COURT: I don't hear one that I could think of.

10                      MR. LINGL: They could apply for a straightforward  
11           11       injunction prohibiting the association from expending monies  
12           12       and directing the association to pay X number of dollars per  
13           13       month to the creditor.

14                      You know, we really do have this Civil Code  
15           15       section 1364(A), which really does say that every common  
16           16       interest -- that the association involved with every common  
17           17       interest development has an affirmative duty, affirmative  
18           18       responsibility to maintain the common areas of common interest  
19           19       developments. I mean, that's the legislative scheme for  
20           20       management, maintenance and care.

21                      THE COURT: Well, they still -- they also have a duty  
22           22       not to cheat and steal causes a six million dollar judgment  
23           23       against them.

24                      MR. LINGL: Seven, actually.

25                      But, your Honor, there is no allegation of  
26           26       cheating and stealing. There is an allegation of breach of  
27           27       contract --

28                      THE COURT: Well, I know this case.

3

1 MR. LINGL: I know you do.

2 THE COURT: And the allegations are a lot more than  
3 breach of contract.

4 MR. LINGL: And tort.

5 THE COURT: Yeah. What kind of tort?

6 MR. LINGL: Trade libel.

7 THE COURT: Yeah.

8 MR. LINGL: Well, again, the homeowners aren't  
9 responsible for the torts.

10 THE COURT: Well, I don't think a homeowners  
11 association can come in here and say, well, the homeowners  
12 aren't liable so you can't take our money that we earn every  
13 month. I just don't think so.

14 In fact, that's -- that's --

15 MR. LINGL: If I were -- Again, if I were the XYZ  
16 Widget Corporation and we were here in this very same  
17 situation and plaintiff -- or ZM Corporation were asking you  
18 for an order telling the association to go to their  
19 shareholders and cough up the money necessary to pay off the  
20 judgment, you'd throw them out. Because the law is clear, the  
21 shareholders of a corporation are not liable for the debts of  
22 a corporation.

23 THE COURT: I didn't say they were, but they are going  
24 to scoop up the income. They obviously aren't liable.

25 On the other hand, they're all going to be in the  
26 dark because there isn't going to be any funds to pay  
27 utilities and everything else. So you can say they're not  
28 liable, but they're going to suffer the consequences of the

3           1       acts of the board of directors. It's quite clear that's going  
2           2       to happen and it's quite clear that considering this case, the  
3           3       history of this case, that they aren't going to pay a dime  
4           4       voluntarily. That's my view of it and that's why I think the  
5           5       request is a reasonable one.

6                     The confirmation hearing is set for February 11,  
7           7       8:30, right here.

8                     MR. LINGL: February 11?

9                     THE COURT: Right. It has to be within ten days.

10                    MR. LOUGHMAN: Thank you, your Honor.

11                    THE COURT: All right, I filled in the blanks.  
12           12       Receiver needs to post the bond before he takes over.

13                    MR. CAMPBELL: Correct.

14                    MR. LINGL: Thank you, your Honor.

15                    MR. CAMPBELL: Your Honor, I have a copy of the signed  
16           16       order of Judge Mund dismissing the bankruptcy. We had the  
17           17       proposed just like we --

18                    THE COURT: Okay, I know it's one of the exhibits. I  
19           19       did look at it.

20                    MR. LOUGHMAN: Exhibit B.

21                    THE COURT: Yeah, B.

22                    MR. CAMPBELL: Thank you, your Honor.

23                             (Proceedings concluded.)

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25                             ---o0o---