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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

**IN THE MATTER OF THE CALL OF THE ANNUAL MEETING OF
STOCKHOLDERS OF CHAMORRO EQUITIES, INC.,** a Guam Corporation,

by

WALTER D. ULLOA, as Stockholder,
Petitioner-Appellant,

ROBERT ULLOA,
Respondent-Appellee.

Supreme Court Case No. CVA11-020
Superior Court Case No. CV1431-11

OPINION

Cite as: 2012 Guam 10

Appeal from the Superior Court of Guam
Argued and submitted on February 24, 2012
Hagåtña, Guam

Appearing for Petitioner-Appellant:

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, C.J.:

[1] Petitioner-Appellant Walter D. Ulloa, a stockholder of Chamorro Equities, Inc. (“CEI”), appeals from the trial court’s order vacating its previous order directing Walter to call the annual meeting of CEI, nullifying actions taken at the special meeting of CEI stockholders, and directing that the election of CEI directors will take place at the annual meeting of stockholders to be held on October 25, 2011. For the reasons herein, we reverse the trial court’s order.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Walter D. Ulloa (“Walter”), a stockholder of CEI, a Guam corporation, filed a Verified Petition for Order Directing Petitioner to Call Annual Meeting of Stockholders in the Superior Court of Guam pursuant to 18 GCA § 2210. The trial court¹ subsequently ordered Walter to promptly call the annual meeting of CEI and preside over the meeting “if there be no person legally authorized and present to preside at [the] Annual Meeting.” Record on Appeal (“RA”), tab 6 at 2 (Order, Aug. 24, 2011). Walter issued a Call of Annual Meeting of the Stockholders of CEI, which was to take place on September 15, 2011. Respondent-Appellee Robert Ulloa (“Robert”), president of CEI, filed a second *ex parte* motion to vacate the first order on the grounds that it was issued without notice. At the hearing on the *ex parte* motion to vacate the order, the trial court² orally vacated its August 24, 2011 order and ruled that CEI’s annual stockholders’ meeting would take place on October 25, 2011. The trial court also ruled that the September 15, 2011 meeting could be used for a special meeting “[i]f it complies with the

¹ The case is assigned to Presiding Judge Lamorena. Judge Barcinas heard the initial motion, sitting as the *ex parte* judge.

² Presiding Judge Lamorena heard the second *ex parte* motion.

bylaws . . . of the corporation.” RA, tab 36, ex. A at 1 (Cert. of Pet’r’s Counsel, Sept. 20, 2011). When Walter’s counsel indicated that the petitioner would like to elect directors at the special meeting, the trial court simply directed him to comply with the articles of incorporation and bylaws. *Id.* at 2.

[3] The trial court’s action prompted three stockholders representing approximately 30.9% of the voting power of the corporation to issue a Call of Special Meeting of Stockholders of CEI to be held on October 4, 2011, “for the purpose of the election of the Directors of Chamorro Equities, Inc.” RA, tab 25 at 1-2 (Call of Special Mtg. of Stockholders of CEI, Sept. 13, 2011); RA, tab 3, ex. D at 2 (Guam Annual Report, Aug. 11, 2011). In response, Robert filed a third ex parte motion to vacate the Call and Notice of the special meeting on the grounds that the meeting was for the improper purpose of electing directors. Meanwhile, the shareholders purported to elect a new board of directors at the special meeting held on October 4, 2011. The trial court subsequently issued an Order on October 21, 2011, finding that the Call and Notice of the special meeting was not effective because “the call was not made by stockholders holding at least 50% of the shares entitled to be voted.” RA, tab 53 at 2 (Order, Oct. 21, 2011). The court also found that no valid purpose was stated in the Notice, as required by Section 2.04.01 of CEI’s bylaws, and any action taken at the special meeting was invalid. *Id.* The trial court reiterated its prior orders which vacated the Order of August 24, 2011 and ruled that the election of directors would occur at the annual meeting of stockholders on October 25, 2011. *Id.* At the annual meeting on October 25, 2011, the shareholders proceeded to elect a different set of directors from the directors elected at the October 4, 2011 special meeting of stockholders, over the written objection of Walter. Thereafter, Walter timely filed this appeal.

II. JURISDICTION

[4] This court has jurisdiction over an appeal from a final order of the Superior Court of Guam pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-135 (2012)); 7 GCA §§ 3107(b) and 3108(a) (2005).

III. STANDARD OF REVIEW

[5] This court reviews issues of statutory interpretation *de novo*. *Mendiola v. Bell*, 2009 Guam 15 ¶ 11 (citing *Quichocho v. Macy's Dep't Stores, Inc.*, 2008 Guam 9 ¶ 13).

IV. ANALYSIS

A. The Trial Court Erred by Ordering the Election of Directors Take Place at the Annual Meeting When It Had Authorized a Special Meeting for the Same Purpose

[6] Walter asserts that the trial court erred when it ordered that CEI's directors be elected at the annual meeting of stockholders on October 25, 2011, assuming that directors had already been elected for a one-year term of office at the special meeting on October 4. Appellant's Br. at 15, 22-23 (Nov. 3, 2011). Walter further asserts that the trial court erred when it deferred to the discretion of CEI's president under CEI's bylaws to select the date of the annual meeting of stockholders because Guam law provides that corporate bylaws may only make a provision for the time of election of directors. *Id.* at 23-25. In response, Robert asserts that new directors can only be elected at the annual meeting of stockholders. *See* Appellee's Br. at 16 (Dec. 12, 2011). Robert further asserts that 18 GCA § 2203(1) expressly allows a bylaw granting the president the right to set the date of the annual meeting. *Id.* at 8.

1. The General Corporation Law Applies to Chamorro Equities, Inc.

[7] In 2009, the Guam Business Corporation Act was enacted by Guam Public Law 29-144:1, and all corporations formed after its effective date are governed by it. 18 GCA Chapter

28 (added by Pub. L. 29-144:1, Jan. 30, 2009); 18 GCA § 1101.1 (added by Pub. L. 29-144:3, Jan. 30, 2009). Title 18 GCA § 1101.1 provides: “A corporation organized in Guam prior to the effective date of the Guam Business Corporation Act *shall not* be subject to the Guam Business Corporation Act, and *shall* continue to be governed by this part, except as provided in the Guam Business Corporation Act.” 18 GCA § 1101.1 (added by Pub. L. 29-144:3 (Jan. 30, 2009). Because CEI was organized in 1987, it is governed by Part 1 of Title 18 of the Guam Code, known as “The General Corporation Law.” *See* RA, tab 1, Ex. A (Articles of Incorporation of CEI, June 29, 1987); *Dumaliang v. Silan*, 2000 Guam 24 ¶ 8.

[8] “[A] ‘corporation is a creature of statute, acquiring its existence and authority to act from the state.’” *Baldwin Cnty. Electric Membership Corp. v. Lee*, 804 So. 2d 1087, 1090 (Ala. 2001) (quoting 1 Charles Keating & Gail O’Gradney, *Fletcher Cyclopedia of the Law of Private Corporations* § 3635, at 226 (1990)). “[T]he charter of a corporation consists of its articles of incorporation taken in connection with the law under which it was organized;” *State ex rel. Carter v. Harris*, 141 So. 2d 175, 176 (Ala. 1961). “Thus, where the articles of incorporation or the bylaws conflict with the statute, the statute controls.” *Lee*, 804 So. 2d at 1090. To the extent that CEI’s bylaws conflict with the General Corporation Law, the General Corporation Law controls.³

2. Guam Law Permits Corporate Bylaws to Vest Discretion in an Officer to Set the Date for Election of Directors

[9] Walter asserts that the trial court erred when it deferred to the discretion of CEI’s president under CEI’s bylaws to select the date of the annual meeting because the bylaw

³ All issues under consideration in this appeal are governed by the General Corporation Law. The exceptions provided for in the Guam Business Corporation Act do not apply. *See* 18 GCA § 281702 (added by Pub. L. 29-144:1, Jan. 30, 2009).

provision does not specify the time of election of directors. *See* Appellant's Br. at 23-26; RA, tab 36, ex. A at 1 (Cert. of Pet'r's Counsel). Walter argues that Guam law authorizes a corporate bylaw that provides for the time of election of directors, not one that allows for the date of election to be selected by the president of the corporation. Appellant's Br. at 25-26. Walter further argues that placing discretion with a president to determine the date of the annual meeting is against public policy because it would allow him to indefinitely extend his statutory term of office. *Id.* at 24. In response, Robert asserts that the bylaw provision vesting discretion in the president to set the date for the annual meeting provides for the time of election of directors. *See* Appellee's Br. at 6. Robert argues that 18 GCA § 2203(1) expressly allows a bylaw granting the president the right to set the date of the annual meeting. *Id.* at 8.

[10] Guam's statutory provision regarding the election of directors provides, in pertinent part:

[D]irectors shall be elected to hold their offices for one (1) year and until their successors are elected and qualified. Thereafter the directors of the corporation shall be elected annually by the stockholders if it be a stock corporation . . . , and if no provision is made in the bylaws for the time of election the same shall be held on the first Tuesday after the first Monday in January

18 GCA § 2202 (2005). Regarding a corporation's bylaw provisions, 18 GCA § 2203 provides:

A corporation may, unless otherwise prescribed by this Part, in its bylaws prescribe:

(1) For the time, place, and manner of calling and conducting regular or special meeting of its directors, and the time and manner of calling and conducting regular or special meetings of stockholders or members;

. . . .

(6) The time for holding the annual election of directors and the mode and manner of giving notice thereof;

18 GCA § 2203 (2005).⁴

[11] Section 2.02 of CEI’s bylaws provides that “[t]he annual meeting of shareholders shall be held upon a date to be selected by the president of the corporation and established by written notice given to all stockholders. . . .” RA, tab 3, ex. B. at 1 (Bylaws of CEI, Sept. 30, 1987).

[12] Walter asserts that 18 GCA § 2203(6) implicitly precludes a bylaw giving any corporate president the right to set the date of the annual meeting for election of directors because section 2203(6) prescribes that a day and month should be set. Appellant’s Reply Br. at 3-4 (Dec. 27, 2011). In response, Robert asserts that Guam law does not require annual meetings to be set 365 days apart and it is reasonable and prudent to provide flexibility as to the date of the annual stockholder meeting and election of directors. Appellee’s Br. at 7-8. There is no language in 18 GCA § 2203 that specifies what the statute precludes; the statute only specifies what corporations may prescribe. Moreover, Walter’s contention that “time reasonably means a *day* in a *month*” is not supported by case law. *See* Appellant’s Br. at 25. We see no reason to interpret the word “time” in such a restrictive manner, in the absence of legislative intent indicating otherwise. We find that the “time for holding the annual election of [the] directors” reasonably includes the date of the annual election. *See* 18 GCA § 2203. Thus, Guam law permits a corporate bylaw provision setting the date of election of directors. Because the bylaws provide for the time of the election of directors, we will not look to 18 GCA § 2202 to determine the time of the annual election.

[13] Walter further asserts that section 2.02 vesting discretion in the president to set the date of the annual meeting merely provides for the “mode and manner of giving notice” of the annual

⁴ Sections 2202 and 2203 are derived from sections 302 and 303 of the 1952 Guam Civil Code but do not mirror any current statute in any other jurisdiction.

election of directors, and not the time of election. Appellant's Br. at 25. This contention is invalid because the language that places discretion in the president does not provide for the mode and manner of notice to be given by the president. Rather, section 2.02 provides for the mode and manner of notice when it states that the annual meeting will be "established by written notice given to all stockholders." See RA, tab 3, ex. B at 1 (Bylaws of CEI). Moreover, a bylaw provision that prescribes "[t]he time for holding the annual election" under 18 GCA § 2203(6) encompasses the placement of discretion in a corporation's officer to set the time of the election. 18 GCA § 2203(6). This is especially so in light of the general authorization contained in 18 GCA § 2202 for a corporation to make a provision in its bylaws for the time of election of directors. See 18 GCA § 2202.

[14] In fact, the New York Supreme Court, Appellate Division, in interpreting a similar New York statute,⁵ recognized a corporate bylaw provision that expressly placed in the board of directors the discretion for fixing the date of the annual meeting for election of directors. *In re Unexcelled, Inc.*, 281 N.Y.S.2d 173, 177 (App. Div. 1967). Walter distinguishes *In re Unexcelled* on the grounds that a date was clearly fixed by the bylaws in that case, whereas CEI's bylaws vest the fixing of the time or date "entirely at the whim of CEI's president." Appellant's Reply Br. at 3. In that case, the bylaws specified that the annual meeting of shareholders "shall be held on such date and at such time in each calendar year as its Board of Directors may in its discretion determine, but not later than the fourth Wednesday in July of each calendar year." *In re Unexcelled, Inc.*, 281 N.Y.S.2d at 175. Notwithstanding this limit on the board's discretion, the bylaw in effect places discretion in directors for a period of time to set the annual meeting on any date of its choosing. Thus, in reading 18 GCA §§ 2202 and 2203

⁵ See N.Y. Bus. Corp. Law § 602 (McKinney 2012).

together, it is clear that Guam law authorizes a corporation to formulate a bylaw provision that places discretion in a corporate officer to set the date of the annual election of directors.

[15] Walter argues that placing discretion in a president to determine the date of the annual meeting is against public policy “because it would allow the president or the directors to continuously postpone the annual meeting . . . in order to unlawfully and indefinitely extend their statutory terms of office.” Appellant’s Br. at 24 (citing *Silverman v. Gilbert*, 185 So. 2d 373, 376 (La. Ct. App. 1966)). However, Walter misinterprets the court in *Silverman*, which did not find that a corporation’s placement of discretion in its officers was against public policy. See *Silverman*, 185 So. 2d at 375-76. Rather, the *Silverman* court recognized the discretion of the board of directors to determine the date of the annual meeting as authorized by the corporation’s charter. See *id.* The *Silverman* court narrowly held that the directors in that case did not possess authority to postpone the annual meeting indefinitely after they had already made the call and notice for the annual meeting. See *id.* at 376-77. The *Silverman* case is distinguishable because this case did not involve a postponement of a meeting that had already been called. We see no reason why the placement of discretion in a corporate officer to set a date for the annual election goes against public policy, as long as the officer is diligent in doing so or there are safeguards in place if the officer does not act diligently. Under Guam law, it is within a corporation’s power to provide for flexibility with regard to the date of the annual election of directors if it wishes to do so and there are statutory safeguards available when an officer authorized to call a meeting fails to do so. See 18 GCA §§ 2210, 2213 (2005).⁶

⁶ Title 18 GCA § 2210 provides:

Whenever, from any cause, there is no person authorized to call a meeting, or when the officer authorized to do so refuses, fails, or neglects to call a meeting, the judge of the Superior Court, on the showing of good cause thereof, may issue an order to any stockholder or member of a corporation, directing him to call a meeting of the corporation by giving the proper notice

[16] In conclusion, since Guam law permits a bylaw provision that vests discretion in the corporation's president to set the date of the annual meeting of shareholders, which qualifies as the time of election of the directors, the trial court did not err in deferring to the discretion of CEI's president in setting the date of the annual meeting.

3. Guam Law Permits the Election of Directors at a Special Meeting

[17] Walter argues that new directors may be elected at a special meeting of stockholders. Appellant's Br. at 15. Robert counters that new directors can only be elected at the annual meeting of stockholders and that a special meeting for the election of the directors functions as a removal of holdover directors and therefore directors may only be removed by a vote of the stockholders holding or representing two-thirds of the paid up capital stock entitled to vote. See Appellee's Br. at 15-17; 18 GCA § 2209 (2005).

[18] Title 18 GCA § 2213 provides:

Failure to Hold Meetings; Special Meeting.

If for any cause no meeting is held on the day fixed and appointed by law or by the bylaws of the corporation for holding the election of directors *a meeting may be called for that purpose either by the directors or as provided in § 2210 hereof*; and, at the meeting held in pursuance of such call the election may be had with the same effect as if it had taken place on the day fixed by law or by the bylaws of the corporation.

18 GCA § 2213 (2005) (emphasis added). It is clear that directors may be elected at a special meeting “[i]f for any cause no meeting is held on the day fixed and appointed by law or by the bylaws of the corporation for holding the election of directors.” *Id.* However, section 3.04 of

required by this Part or the bylaws; and if there be no person legally authorized to preside at such meeting, the judge of the Superior Court may direct the person calling the meeting to preside at the same until a majority of the members of stockholders representing a majority of the stock present and permitted by law to be voted have chosen one of their number to act as presiding officer for the purpose of the meeting.

18 GCA § 2210 (2005).

CEI's bylaws provides that "[t]he directors shall be elected by ballot at the annua[l] meeting of the shareholders, to serve for one (1) year and until their successor are elected and have qualified." RA, tab 3, ex. B at 7 (Bylaws of CEI). Because section 3.04 qualifies that directors shall be elected at the annual meeting of shareholders, the election of directors may occur at a special meeting, if the special meeting is designated for that purpose in accordance with 18 GCA § 2213. If a special meeting also functions as an annual meeting, removal is not necessary before election because a director is necessarily removed through election. *See Hoschett v. TSI Int'l Software, Ltd.*, 683 A.2d 43, 46 (Del. 1996). The Delaware Supreme Court explains:

Since the term of office of each of the directors of the company had expired, they acted as holdovers even though they continued to hold office. Thus the action to reelect them or to elect their successors logically entailed removal and filling of the resulting vacancy.

Id.

[19] In this case, Walter did not designate the special meeting as an annual meeting. RA, tab 26 at 1 (Not. of Special Mtg. of Stockholders of CEI, Sept. 13, 2011). However, this is because the trial court had already ordered that an annual meeting would take place on October 25, 2011. *See* RA, tab 36, ex. A at 1 (Cert. of Pet'r's Counsel). Nevertheless, if the Call and Notice for the special meeting was valid under CEI's bylaws, the special meeting to elect directors was valid as an annual meeting called for the purpose of holding the election of directors, and removal of the holdover directors was unnecessary.

4. The Call and Notice for the Special Meeting was Valid under CEI's Bylaws

[20] The trial court found that the Call and Notice for the special meeting was not effective for the purpose of the election of directors of CEI since the call was not made by stockholders holding at least 50% of the shares entitled to vote and no valid purpose was stated. RA, tab 53 at

2 (Order, Oct. 21, 2011). We disagree. Under 18 GCA § 2213, a special meeting for election of directors “*may* be called for that purpose either by the directors or as provided in § 2210.” 18 GCA § 2213 (emphasis added). Since 18 GCA § 2213 uses the word “*may*,” the statute does not preclude other means than that specified in 18 GCA § 2213 by which a special meeting may be called. *Id.* Section 2.03 of CEI’s bylaws provides for other means to call a special meeting for election of directors and is not in conflict with 18 GCA § 2213:

Special meetings of the shareholders for any purpose or purposes whatsoever, may be called at any time by the president, or by the board of directors, or by one or more shareholders holding not less than one-fifth (1/5) of the voting power of the corporation.

RA, tab 3, ex. B at 1-2 (Bylaws of CEI). The special meeting for the purpose of the election of directors was called by three stockholders representing approximately 30.9% of the voting power of the corporation, claiming that the trial court authorized them to call the special meeting at the September 12, 2011 hearing. RA, tab 25 at 1-2 (Call of Special Mtg. of Stockholders of CEI); RA, tab 3, ex. D at 2 (Guam Annual Report, Aug. 11, 2011). Because the special meeting of the shareholders under CEI’s bylaws may be held for any purpose whatsoever and was called by shareholders representing not less than one-fifth of the voting power, the special meeting was valid as an annual meeting for the election of directors. Thus, when the trial court instructed Walter that he could call a special meeting for the election of directors if it complied with the bylaws, the court implicitly authorized two meetings for the election of directors, having already authorized an annual meeting to take place on October 25, 2011. RA, tab 36, ex. A at 1 (Cert. of Pet’r’s Counsel).

[21] Because the trial court authorized two separate meetings for the election of directors, it is reasonable to conclude that some of the shareholders may have been confused and did not attend

the special meeting on October 4 because they did not believe it to be for the election of directors. Although we reverse the trial court's October 21, 2011 Order finding that the Call and Notice of the annual meeting of CEI stockholders was not effective and that no valid purpose was stated, it would not be fair to let the results of the October 4, 2011 meeting stand. The trial court erred when it authorized two shareholder meetings; the August 24, 2011 order issued pursuant to 18 GCA § 2210 should not have been vacated and is hereby reinstated.

5. Reinstatement of August 24, 2011 Order

[22] The trial court initially ordered Walter to promptly call the annual meeting of CEI and preside over the meeting "if there be no person legally authorized and present to preside at the Annual Meeting." RA, tab 6 at 2 (Order, Aug. 24, 2011). A different judge subsequently vacated the order. RA, tab 36, ex. A at 1 (Cert. of Pet'r's Counsel).⁷

[23] Title 18 GCA § 2210 provides:

Whenever, from any cause, there is no person authorized to call a meeting, or when the officer authorized to do so refuses, fails, or neglects to call a meeting, the judge of the Superior Court, on the showing of good cause thereof, may issue an order to any stockholder or member of a corporation, directing him to call a meeting of the corporation by giving the proper notice required by this Part or the bylaws; and if there be no person legally authorized to preside at such meeting, the judge of the Superior Court may direct the person calling the meeting to preside at the same until a majority of the members of stockholders representing a majority of the stock present and permitted by law to be voted have chosen one of their number to act as presiding officer for the purpose of the meeting.

18 GCA § 2210. The trial court's initial order advising Walter to call the annual meeting was proper under section 2210 because the CEI president had failed to call an annual meeting for 2011. Although Robert argued at the trial court level that Walter failed to give proper notice for the annual meeting of stockholders to take place on September 15, 2011, Robert's failure to

⁷ The record does not indicate on what grounds the trial court vacated the order. *See* RA, tab 36, ex. A at 1 (Cert. of Pet'r's Counsel, Sept. 20, 2011).

appeal the ex parte order regarding notice means the issue is forfeited. *See* RA, tab 15 at 1-6 (Mem. Br. in Supp. of Ex Parte Mot., Sept. 7, 2011); *Univ. of Guam v. Guam Civil Serv. Comm'n*, 2002 Guam 4 ¶ 20 (“[T]his court will not address an argument raised for the first time on appeal.”). Thus, the August 24, 2011 order shall be reinstated, and the matter is remanded back to the trial court to direct a stockholder or member of CEI to call an annual meeting pursuant to 18 GCA § 2210.

V. CONCLUSION

[24] We **REVERSE** the trial court’s Order authorizing both the October 25, 2011 annual meeting and the October 4, 2011 special meeting, and we invalidate the election of directors that occurred at both meetings. The trial court’s August 24, 2011 order is reinstated, and we **REMAND** the matter back to the trial court to direct a stockholder or member of CEI to call an annual meeting pursuant to 18 GCA § 2210.

Original Signed - **Robert J. Torres**

By

ROBERT J. TORRES
Associate Justice

Original Signed - **Katherine A. Maraman**

By

KATHERINE A. MARAMAN
Associate Justice

Original Signed - **F. Philip Carbullido**

By

F. PHILIP CARBULLIDO
Chief Justice