STATE OF MICHIGAN

COURT OF APPEALS

RICHARD S. SMITH and BRIAN DROBET,

Plaintiffs-Appellees,

v

DAN GILBERT, RON BERMAN, NEAL DEMPSEY, DENMAN VAN NESS, JAMIE MILLER, and CRAIG DANULOFF,

Defendants-Appellants.

UNPUBLISHED
December 28, 2001

No. 222211
Wayne Circuit Court
LC No. 99-911664-CZ

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendants appeal by leave granted from the order granting in part and denying in part defendants' motion for summary disposition. We affirm.

Plaintiffs, a group of minority shareholders in iCAT Corporation (iCAT), filed a class action complaint against defendants, who were officers, directors, and controlling shareholders of iCAT. The complaint alleged that defendants breached fiduciary duties they owed to plaintiffs by loaning money to iCAT and subsequently structuring the sale of iCAT's assets to maximize their own returns and minimize the value of plaintiffs' shares. Defendants filed a motion to dismiss on three grounds: (1) under MCR 2.116(C)(8), plaintiffs failed to state a claim for individual relief, but could only bring a shareholder's derivative action; (2) the complaint failed to plead fraud with particularity under MCR 2.112(B)(1); and (3) the court lacked personal jurisdiction over some defendants. The court denied defendants' motion on the first and second grounds, but granted the motion on the basis of lack of personal jurisdiction and dismissed the complaint against all defendants except Dan Gilbert and Ron Berman.

On appeal, defendants challenge only the court's denial of summary disposition under MCR 2.116(C)(8). Defendants argue that plaintiffs may bring a direct action only if the complaint alleges an injury to them separate and distinct from injury to other shareholders, or arising from a special contractual duty owed to plaintiffs by iCAT, and that the complaint alleges neither. Defendants assert that the alleged injuries damaged all iCAT shareholders in the same way: by reducing the value of their shares.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Guardian Photo, Inc v Dep't of Treasury*, 243 Mich App 270, 276; 621 NW2d 233 (2000). Where the motion is based on a failure to state a claim under MCR 2.116(C)(8), this Court is to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Id.* A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Id.* All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The parties agree that because iCAT is a Delaware corporation, the outcome of this issue must be determined under Delaware law. This Court may apply Delaware law. *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994).

"The distinction between derivative and individual actions rests upon the party being *directly* injured by the alleged wrongdoing." *Kramer v Western Pacific Industries, Inc*, 546 A2d 348, 351 (Del Supr, 1988). A derivative suit involves a shareholder or shareholders suing on behalf of the corporation for harm done to the corporation, while an individual or direct action involves a shareholder suing for an injury separate and distinct from injury suffered by other shareholders, or a wrong arising from a contractual right of a shareholder that is independent of any right of the corporation. *Id.* Here, plaintiffs allege that they suffered a separate and distinct injury.

With regard to the distinction between direct and derivative claims in the context of a merger, the Delaware Supreme Court recently elaborated on the rule stated in *Kramer*, *supra*:

> Stockholders may sue on their own behalf (and, in appropriate circumstances, as representatives of a class of stockholders) to seek relief for direct injuries that are independent of any injury to the corporation. A stockholder who directly attacks the fairness or validity of a merger alleges an injury to the stockholders, not the corporation, and may pursue such a claim even after the merger at issue has been consummated. The problem is that it is often difficult to determine whether a stockholder is challenging the merger itself, or alleged wrongs associated with the merger, such as the award of golden parachute employment contracts. [*Parnes v Bally Entertainment Corp*, 722 A2d 1243, 1245 (Del Supr, 1999).]

The court further stated that "[i]n order to state a direct claim with respect to a merger, a stockholder must challenge the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price." *Id.*

Here, plaintiffs allege that defendants agreed to sell iCAT on unfair terms that benefited themselves at the expense of plaintiffs and other shareholders. Specifically, plaintiffs allege that defendants disguised capital contributions to iCAT as "bridge-debt financing," and then structured the sale of iCAT so that defendants' alleged loans were repaid, and plaintiffs received "virtually nothing for their investments." Thus, plaintiffs allege unfair dealing in the sale of iCAT that resulted in injury to plaintiffs. Further discovery is necessary regarding the alleged "bridge-debt financing" to determine whether those transactions or the payoff of the alleged loans

actually affected the fairness of the sale process or price. At this point, however, we cannot conclude that no factual development could establish plaintiffs' claim and justify recovery.

Accepting the factual allegations in the complaint and any reasonable inferences therefrom as true, plaintiffs, as minority shareholders, could eventually prove that they suffered a compensable injury separate and distinct from other iCAT shareholders. Accordingly, the motion for summary disposition was properly denied under MCR 2.116(C)(8).

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen

Collins, P.J., did not participate.