COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1215 **Cir. Ct. No. 2015CV20**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

LOWELL BESSETTE,

PLAINTIFF-APPELLANT,

V.

DAVID BESSETTE, DEBBIE BESSETTE, JON M. RUTTEN, MEKCO MANUFACTURING, INC. AND BESSETTE, LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Lowell Bessette appeals from an order granting summary judgment to David Bessette (Lowell's son), Debbie Bessette (David's wife), Jon Rutten (Lowell's brother-in-law), Mekco Manufacturing, Inc., and Bessette, LLC (hereinafter collectively "respondents"). Lowell, a minority

shareholder in Mekco, brought direct claims for: (1) fraud, (2) breach of fiduciary duty, and (3) shareholder oppression pursuant to WIS. STAT. § 180.1430 (2015-16).[1] The circuit court concluded Lowell failed to allege fraud with sufficient specificity; his breach of fiduciary duty claim failed because the injuries Lowell alleged were direct injuries to Mekco, not Lowell, and thus he needed to bring a derivative action; and "neither dissolution nor other equitable remedies" were appropriate as to Lowell's oppression claim.[2] We affirm.

Background

¶2 Mekco Manufacturing, Inc. was incorporated in the early 1980s, with Lowell, David, and Rutten as equal shareholders. All three worked for the business until Lowell retired in 1997. David and Rutten continued to operate Mekco, and at some point Debbie also began working for Mekco. She became its secretary in 2005 after Rutten resigned from his officer positions.

¶3 Lowell, David, and Rutten also formed a real estate holding partnership, Bessette, Bessette & Rutten ("the partnership"), which owned two parcels of real estate Mekco leased for its operations. Mekco's rent payments to the partnership were utilized as a way of distributing Mekco profits to the shareholders. After Lowell's retirement in 1997, he received a portion of the Mekco profits through Mekco's rent payments to the partnership, which were equally distributed to Lowell, David, and Rutten. While the amount of the rent

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] A fourth cause of action was dismissed by the circuit court on respondents' motion to dismiss. That cause of action is not part of this appeal.

payments varied throughout the years, from 2008 through November 1, 2011, payments were $240,000 per year. In the following years, rent payments were reduced to $130,000 per year until they again were raised to $240,000 per year effective November 1, 2013.

¶4 On February 14, 2014, Lowell, through his attorney, requested financial information from David related to Mekco and the partnership. Three days later, Mekco held a shareholders' meeting, which Lowell participated in via teleconference. Lowell was informed during this meeting that Rutten was planning to leave Mekco, and another meeting was scheduled for March 3, 2014. Lowell attended this second meeting in person, during which Rutten's impending departure was discussed, as well as strategies for attempting to sell Mekco.

¶5 In addition to renting property from the partnership, Mekco also rented property from Country Visions Co-op. Mekco's rent for the Country Visions property was negotiated down from $3500 to $1750 per month in 2011. In November 2013, David acquired the Country Visions property through a limited liability corporation he owned, Bessette, LLC. Beginning in March 2014, pursuant to an alleged agreement of the shareholders during the March 2014 meeting, Mekco paid increased rent in the amount of $240,000 per year, retroactive to November 15, 2013, for the Country Visions property.

¶6 Lowell disputes that he agreed to the increase in rent for the Country Visions property. The summary of the minutes of the March meeting indicate "the company also agreed to lease additional space from Bessette, LLC formerly … Country Visions" with the parties "agree[ing] to pay the same amount of annual rent for this property as had been established between the company and the partnership ($240,000)," and pay that amount retroactive to November 2013.

Lowell avers that he does not remember agreeing to the increase in rent payments and that he was provided with "a copy of the tape from which the minutes were purportedly prepared" and "nowhere on the tape is any discussion of retroactively increasing rent for the Bessette, LLC property to $240,000."

¶7 Mekco assets and the real estate owned by the partnership were eventually sold, and Lowell received one-third of the proceeds.

¶8 Lowell filed this action, and respondents moved for summary judgment, arguing that Lowell did not suffer a "loss particular to himself" and, therefore, his claims failed as a direct action and could only be maintained as a derivative action on behalf of Mekco. Respondents also argued that Lowell's "request for judicial dissolution [due to shareholder oppression] does not make sense. All of Mekco's assets have been sold, Mekco's name has been changed, and with the exception of some funds remaining to deal with dissolution, there is little to dissolve." The circuit court granted the respondents' motion and Lowell appeals.

Discussion

Standard of Review

¶9 Our review of a circuit court's decision on summary judgment is de novo. ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶11, 318 Wis. 2d 622, 768 N.W.2d 568. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** We apply the same summary judgment methodology as the circuit court:

> We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law. If we

> conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial.

Ande v. Rock, 2002 WI App 136, ¶8, 256 Wis. 2d 365, 647 N.W.2d 265 (footnote omitted; citations omitted).

¶10 We review de novo whether a complaint sufficiently alleges a claim of fraud, *see* ***Hausman v. St. Croix Care Ctr., Inc.***, 207 Wis. 2d 400, 406, 411, 558 N.W.2d 893 (Ct. App. 1996), and whether a particular set of facts supports a direct claim for breach of fiduciary duty, *see* ***Notz v. Everett Smith Grp., Ltd.***, 2009 WI 30, ¶14, 316 Wis. 2d 640, 764 N.W.2d 904. Also, "[w]hether a minority shareholder has been oppressed within the meaning of WIS. STAT. § 180.1430(2)(b) is a mixed question of fact and law." ***Reget v. Paige***, 2001 WI App 73, ¶11, 242 Wis. 2d 278, 626 N.W.2d 302. Where, as in this case, the parties agree to the material facts, whether those facts "constitute oppression is a question of law, which we decide *de novo*." ***Id.***

Fraud

¶11 In his amended complaint, Lowell alleged respondents committed "theft by fraud contrary to WIS. STAT. § 943.20(1)(d)." The circuit court initially denied a motion to dismiss this claim, but noted in its summary judgment decision that respondents' summary judgment motion "[i]n effect" renewed that motion. This is essentially correct in that when considering a summary judgment motion, the first thing we are to do is "examine the complaint to determine if it states a claim." ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). "Only if a claim has been stated does the court then proceed to

determine whether the pleadings, depositions, answers to interrogatories, admissions, and affidavits demonstrate a genuine issue as to any material fact." ***C.L. v. Olson***, 143 Wis. 2d 701, 706, 422 N.W.2d 614 (1988); *see also* ***Broome v. DOC***, 2010 WI App 176, ¶12, 330 Wis. 2d 792, 794 N.W.2d 505 ("[S]ubmissions by a plaintiff showing facts not alleged in the complaint do not 'cure' a pleading deficiency."); ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 788, 582 N.W.2d 98 (Ct. App. 1998) ("Since the complaint does not state a claim for breach of contract, we go no farther in the summary judgment analysis."). Here, the complaint fails to sufficiently state a claim of fraud under § 943.20(1)(d).

¶12 WISCONSIN STAT. § 802.03(2) requires that the circumstances constituting fraud must be pled "with particularity." This means allegations of fraud must specify "the particular individuals who made the representations, and … *the details of where and when the misrepresentations were made*, and who the misrepresentations were made to." ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶16, 239 Wis. 2d 78, 619 N.W.2d 271 (emphasis added). This detailed pleading requirement "protects persons from casual allegations of serious wrongdoing and puts defendants on notice 'so that they may prepare meaningful responses to the claim.'" ***Putnam v. Time Warner Cable of Se. Wis., Ltd.***, 2002 WI 108, ¶26, 255 Wis. 2d 447, 649 N.W.2d 626 (citing ***Rendler v. Markos***, 154 Wis. 2d 420, 428, 453 N.W.2d 202 (Ct. App. 1990)).

¶13 Lowell pled that David, Debbie, and Rutten represented to him that "their actions on behalf of the Corporation were for the equal benefit of all of the shareholders proportional to their shares of the Corporation" and "the Corporation was unprofitable and in dire financial circumstances when it only was in that

condition because David, Debbie, and Rutten were taking excessive salaries, bonuses, and other benefits."[3] Lowell's claim of fraud fails to get out of the gate in relation to these general representations because the allegations of his complaint are vague, not particular, and provide no "details of where and when" the alleged misrepresentations were made. Thus, we affirm the circuit court's dismissal of this claim because Lowell failed to plead fraud with the required particularity.

Fiduciary Duty

¶14 The circuit court dismissed Lowell's breach of fiduciary claim on the basis that the injuries alleged by Lowell were direct injuries to Mekco, not Lowell, and therefore, his breach of fiduciary duty claim could not proceed as a direct claim. Lowell argues the court erred in dismissing this claim because he "has asserted an injury that is primarily to the individual shareholder," i.e., him. He specifically emphasizes on appeal allegations in his complaint that Mekco paid excessive rent to Bessette, LLC—owned solely by David—for the Country Visions property and excessive salaries and bonuses to David, Debbie, and Rutten.[4] We affirm the circuit court's grant of summary judgment because these claims are derivative claims, not claims primarily to Lowell.

¶15 Lowell relies most heavily upon ***Notz***, 316 Wis. 2d 640, in arguing he should be allowed to proceed on his breach of fiduciary claim related to the

[3] Lowell admits he "does not know what was actually paid in terms of salaries, bonuses, loan interest or other direct benefits to David and … Rutten."

[4] Lowell also references "[p]ersonal loans from David and Debbie Bessette to Mekco at inappropriately high interest rates" and "Mekco's purchase of a vehicle for David in the amount of $47,519." Because Lowell develops no arguments specific to these matters, we do not address them. *See* ***ABKA Ltd. v. Board of Review***, 231 Wis. 2d 328, 349 n.9, 603 N.W.2d 217 (1999) (we do not address undeveloped arguments).

allegedly excessive rent, salaries, and bonuses. ***Notz*** does not save Lowell's claim. In ***Notz***, the majority shareholder, the Smith Group, owned nearly ninety percent of Albert Trostel & Sons (ATS), while Notz owned less than six percent. ***Id.***, ¶6. At the time of the Smith Group actions that Notz challenged, ATS's board of directors "was comprised entirely of members who were also officers and/or directors of the Smith Group." ***Id.***, ¶7. ATS paid to conduct a due diligence evaluation of a competing business for purposes of potentially acquiring it. ***Id.***, ¶9. The ATS board decided to pass on the opportunity, but shortly thereafter, the Smith Group acquired the business. ***Id.***

¶16 The ***Notz*** court allowed Notz's complaint that the Smith Group alone benefitted from ATS's payment for the due diligence evaluation to proceed as a direct claim:

> [A]s ATS majority shareholder, the Smith Group made the decision to let ATS pick up the tab for the due diligence, the benefits of which expense accrued only to the Smith Group, not to ATS's minority shareholders, when the Smith Group made the decision to acquire [the business] on its own.

Id., ¶24. The court noted that the allegation was that "as majority shareholder," the Smith Group "got the direct and immediate benefit of the due diligence expenditure as shareholders in the corporation that acquired" the business. ***Id.***, ¶27. "As a minority shareholder, Notz did not … receive an offsetting payment." ***Id.***

¶17 Lowell asserts that his "claims regarding rent paid to David Bessette and the excessive salaries and bonuses to David, Debbie and [Rutten] precisely fit" the ***Notz*** court's determination that Notz's claim that the Smith Group's utilization of ATS's due diligence assessment to acquire the business could

proceed as a direct claim by Notz. We disagree. The facts of the case now before us bear key differences from those in ***Notz***. In ***Notz***, the beneficiaries of the due diligence expenditure, the Smith Group, were the *majority* shareholders. As to the rent payments to David, only David, a one-third shareholder, purportedly benefitted from those payments, while two-thirds of the shareholders—Lowell and Rutten—did not. "An injury due to a director's action is primarily an injury to an individual shareholder if it affects a shareholder's rights in a manner distinct from the effect upon other shareholders." ***Jorgensen v. Water Works, Inc.*** (***Jorgensen II***), 2001 WI App 135, ¶16, 246 Wis. 2d 614, 630 N.W.2d 230. In this case, the alleged injury related to rent payments to Bessette, LLC was not unique to Lowell, but was suffered by two-thirds of the Mekco shareholders. Thus, the rents were not "an injury 'primarily … to an individual shareholder,'" i.e., Lowell. *See* ***Notz***, 316 Wis. 2d 640, ¶26.

¶18 And as to Lowell's claim that Mekco paid excessive salaries and bonuses to David, Debbie, and Rutten, they bear no similarity to the due diligence expenditure in ***Notz***. With regard to alleged excessive compensation being paid to employees and thus "wasting corporate assets," we have held that such a claim

> is usually an allegation of an injury primarily to the corporation. Generally, a claim of waste of corporate assets must be pursued in a derivative action; it cannot be brought as a direct action …. Additionally, [plaintiff] was never employed by [the corporation], so the compensation paid to employees is not at the expense of compensation formerly paid to [plaintiff].

Reget, 242 Wis. 2d 278, ¶16. We further stated in ***Reget*** that "[o]ne who complains about the compensation paid to a director who is employed by the corporation must show something more than the compensation paid is higher than he believes is reasonable to overcome the presumption that 'the laborer is worthy

of his hire.'" ***Id.***, ¶18 (citation omitted). Here, there is a simple reason why Lowell did not receive salaries and bonuses like David, Debbie, and Rutten—Lowell was no longer working for Mekco and had not so worked in over ten years. Lowell has shown us no facts of record to counter David's deposition testimony that salaries and bonuses were determined consistent with tax advice Mekco received and that "[w]e've done it the same way since day one. My dad [Lowell] was part of the company." Lowell's complaint that David, Debbie, and Rutten were paid excessively for working to keep the corporation afloat is really a complaint of waste, which is an allegation of primary injury to the corporation, not to Lowell. As we concluded in ***Reget***, "paying compensation in excess of what a minority shareholder believes is appropriate is a claim of injury primarily to the corporation and must be brought as a derivative action." ***Id.***, ¶16 n.10.

¶19 Lowell also summarizes ***Jorgensen II***, 246 Wis. 2d 614, stating that in that case we concluded "that the inequitable treatment" by the four defendant shareholders toward the other two shareholders (husband and wife), who were the plaintiffs, "established an injury primarily to the [two plaintiff shareholders] and provided a proper basis for a direct claim of breach of fiduciary duty." Again, as related to the claim of excessive rent, in ***Jorgensen***, as in ***Notz***, it was majority shareholders taking advantage of their majority position to inflict specific harm upon the two minority shareholders, harm that the majority owners of the business did not share. ***Jorgensen II***, 246 Wis. 2d 614, ¶¶12, 18. In our case, a majority of the shareholders of the corporation, Rutten and Lowell, shared the same fate with regard to rent paid to Bessette, LLC, the LLC owned solely by David. As well, the majority shareholders in ***Jorgensen*** stopped paying to the two minority shareholders pro rata distributions from the business's cash flow, while the four majority shareholders continued receiving those distributions. ***Id.***, ¶¶4, 12. Those

payments, however, were based solely on their ownership of their share of the business, which differs significantly from salaries and bonuses paid to employees of the business for their work. *See* ***id.***, ¶12. In the case now before us, David, Debbie, and Rutten, as employees, provided a service for Mekco separate and distinct from their status as shareholders or officers of the corporation, while Lowell, no longer an employee, did not.

¶20 Lowell's breach of fiduciary claim is a claim of harm primarily to the corporation and not to Lowell; thus, the circuit court properly granted respondents summary judgment with regard to that claim.

Shareholder Oppression/Dissolution of Mekco

¶21 Lowell also seeks dissolution of the corporation based on his allegation of shareholder oppression under WIS. STAT. § 180.1430(2)(b). With regard to this claim, the circuit court stated that Lowell failed to "bring forward allegations supported by some facts that show the [respondents] willfully and wrongfully inflicted an injury upon him that benefited stockholders who were not injured."

¶22 "A court *may* dissolve a corporation if a shareholder shows, among other things, that those in control are acting or will act in an illegal, oppressive or fraudulent manner, or that the corporate assets are being misapplied or wasted." ***Dickman v. Vollmer***, 2007 WI App 141, ¶24, 303 Wis. 2d 241, 736 N.W.2d 202 (emphasis added). "An allegation of oppression is not a claim for relief, but rather, a legal standard to be fulfilled before a circuit court may order liquidation of a corporation based on the acts of those who control it." ***Reget***, 242 Wis. 2d 278, ¶23. "[O]ppression requires that the complaining shareholder prove that those in control of the corporation willfully and wrongfully inflicted a direct injury

upon him that benefitted the stockholders who were not injured." ***Id.***, ¶25. "In the context of a close corporation, oppressive conduct of those in control is closely related to breach of the fiduciary duty owed to minority stockholders." ***Jorgensen***, 218 Wis. 2d at 783.

¶23 We noted in ***Reget*** with regard to one of Reget's claims—failure to maintain a market for the sale of his stock—that all of the defendants "could complain of the same lack of a market as does Reget." ***Reget***, 242 Wis. 2d 278, ¶26. Similarly here, as indicated, Rutten could complain just as Lowell does about the rent payments to Bessette, LLC, since there is no suggestion Rutten received any direct benefit from those payments either. Thus, again, those not benefitting from these rent payments, Lowell and Rutten, controlled two-thirds of the shares.

¶24 Lowell essentially alleges David engaged in self-dealing by participating in the increased rent payments to the LLC owned solely by him. As we recognized in ***Notz***, however, "a majority shareholder's self-dealing may result in injury that is primarily to the corporation." ***Notz***, 316 Wis. 2d 640, ¶22. In the instance of rent payments to Bessette, LLC, it was not even the majority of shareholders who benefitted. The financial benefit of the rent payment increase may have been to David only, but the injury, if there was one, was not individual, specific, and direct as to Lowell, but was to Mekco. Additionally, with respect to Lowell's assertion that David, Debbie, and Rutten were paid excessive compensation comprised of salaries and bonuses, Lowell "has made no showing sufficient to draw into question the good-faith basis" for their compensation. *See* ***Reget***, 242 Wis. 2d 278, ¶26.

¶25 Dissolution of a corporation "does not automatically result even upon proper proof." ***Dickman***, 303 Wis. 2d 241, ¶27. It is discretionary. ***Id.***

Here, the circuit court concluded, "Even if there was the claimed oppression, dissolution of Mekco at this late stage would serve no useful end. The corporation now exists only as a shadow which will linger only until such time as its affairs can be closed out." Considering all facts and reasonable inferences from the record in the light most favorable to Lowell, Lowell has failed to convince us the court misused its discretion in refusing to order dissolution.[5]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).

[5] Because we find for the respondents, we need not address a motion to strike they filed on appeal.