IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

THERESA M. RIZZO, derivatively on behalf of JJ&B, LLC, and in her own right, and JJ&B, LLC, nominally,	)	
Plaintiff,	)	
v.	)	C.A. No. 2551-VCS
JOSEPH RIZZO AND SONS CONSTRUCTION COMPANY, INC., a Delaware Corporation, DIAMOND STATE MASONRY COMPANY, a Delaware Corporation, and RICORE, INC., f/k/a DIAMOND STATE EQUIPMENT COMPANY, a Delaware Corporation,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: March 23, 2007
Date Decided: April 10, 2007

Richard M. Beck, Esquire, Patrick A. Costello, Esquire, KLEHR, HARRISON, HARVEY, BRANZBURG & ELLERS LLP, Wilmington, Delaware, *Attorneys for Plaintiff.*

Jeffrey M. Weiner, Esquire, LAW OFFICES OF JEFFREY M. WEINER, P.A., Wilmington, Delaware, *Attorney for Defendants.*

STRINE, Vice Chancellor.

This is a derivative case involving a "Family Business" that has been split up over time into a number of different entities. The plaintiff, Theresa Rizzo ("Theresa") holds an interest in only one of them, JJ&B, LLC ("JJ&B"), which she acquired in 2001 upon the death of her husband Joseph, one of the founders and managers of the Family Business. JJ&B owns the real estate on which the Family Business operates. Theresa alleges that JJ&B is effectively being controlled by the defendants, the operating entities of the Family Business (the "Operating Entities"). The Operating Entities in turn are controlled by the families of Joseph's brothers. Theresa holds no interest in them. Theresa alleges that the Operating Entities are using their control over JJ&B to benefit themselves at the expense of JJ&B's members. Of particular relevance to this motion, Theresa claims that the Operating Entities are unfairly occupying JJ&B's land without any formal rental agreement and without paying any rent to JJ&B. Theresa's derivative claims include separate counts for injunctive relief, unjust enrichment, breach of fiduciary duty, and ejectment.[1]

This opinion resolves the Operating Entities' motion to dismiss the ejectment count under Court of Chancery Rule 12(b)(1) for lack of subject matter jurisdiction.[2] The motion

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[1] Theresa also brings a direct claim against one of the Operating Entities, Joseph Rizzo and Sons Construction Co., Inc. ("Rizzo Construction"), for breach of a deferred compensation agreement. Rizzo Construction moved for partial summary judgment on that claim. I denied that motion in a bench ruling on March 23, 2007. In that ruling, I also denied the Operating Entities' Rule 12(b)(6) motion to dismiss the entire complaint for failure to state a claim, which was based on the contention that Theresa lacked standing to pursue this action.

[2] The ejectment count was originally pled as one for eviction for failure to pay rent. At oral argument, Theresa's counsel conceded that the eviction count was properly characterized as one for ejectment and not eviction because Theresa does not allege that the Operating Entities have breached any rental agreement between them and JJ&B. Theresa subsequently filed an amended complaint to reflect that concession. In the interest of efficiency, and in accord with the wishes of counsel, I will treat the Operating Entities' original motion to dismiss, which treated the eviction

is premised on a more academic, rather than practical, argument. The Operating Entities concede that if Theresa proves her claims, which are primarily equitable claims about unfair dealing by the defendants controlling JJ&B, this court will have broad power to fashion an appropriate remedy, including the power to remove the Operating Entities from possession of JJ&B's property if the court deems that appropriate. The Operating Entities object, however, to Theresa's having pled ejectment as a separate count in her complaint. They contend that a separate cause of action for ejectment cannot be heard in this court, even in the context of a derivative case founded upon broader equitable claims of unfair dealing. For the reasons I discuss below, I reject that contention and deny the motion to dismiss.

Generally speaking, this court's non-statutory jurisdiction arises in two types of cases: (1) when a plaintiff seeks to press an equitable claim such as a claim for breach of fiduciary duty;[3] and (2) when a plaintiff seeks an equitable remedy or otherwise lacks an adequate remedy at law.[4] Unless one of those two traditional bases is present, this court lacks subject matter jurisdiction.[5] With those principles in mind, I note that an action for ejectment, in which a landowner who is out of possession may prove title to the land and, if successful, be granted possession,[6] is an action at law and is within the common law jurisdiction of the Superior Court.[7] As a result, because a plaintiff seeking ejectment has an adequate remedy at law, this court ordinarily lacks subject matter jurisdiction over the

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count as one for ejectment and was argued on that basis, as a motion to dismiss the ejectment count as amended.

[3] *E.g., IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 n.6 (Del. Ch. 1991).

[4] *E.g., Suplee v. Eckert,* 120 A.2d 718, 720 (Del. Ch. 1956)

[5] *See generally* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2-3(b) (2005).

[6] *See* 10 *Del. C.* § 6701; *Suplee*, 120 A.2d at 719-20.

[7] *E.g., Furness v. Patterson*, 1998 WL 737989, at *2-3 (Del. Super. 1998).

claim.[8] That does not mean, though, as the Operating Entities appear to contend, that a cause of action for ejectment can never be heard in this court. Rather, this court may hear it when other grounds for equity jurisdiction are present,[9] which they are here.

First, courts of this state have long recognized that a derivative claim is "cognizable only in equity."[10] Although typically used to enforce equitable fiduciary obligations owed to a corporation by its officers and directors, a derivative action can also be brought to enforce a purely legal right of the corporation.[11] In such a circumstance, a stockholder cannot bring that derivative claim at law, even though the corporation itself would have been able to bring it.[12] Thus, although ejectment is a legal claim, it becomes a creature of equity when asserted derivatively. Because no remedy at law exists for a shareholder such as Theresa, this court has jurisdiction over her claims.[13]

Moreover, to the extent that there was any question about the proper forum for derivative claims involving limited liability companies, that question was answered by the

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[8] *Suplee*, 120 A.2d at 719.
[9] *See id.* (exercising jurisdiction over a claim that defendants sought to characterize as ejectment because the plaintiff lacked an adequate remedy at law because he was not out of possession, an element of a cause of action for ejectment at law).
[10] *Rebstock v. Lutz*, 158 A.2d 487, 489 (Del. 1960); *see also Schlieff v. Baltimore & O. R. Co.*, 130 A.2d 321, 357 (Del. Ch. 1957) (noting in a derivative case that "obviously, plaintiff could not have sued at law because he is suing in the right of [the corporation]"); *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106, 111-12 (Del. Ch. 1948) (discussing the general equitable nature of derivative actions).
[11] *E.g., Richardson v. Blackburn*, 187 A.2d 823, 823-24 (Del. Ch. 1963).
[12] *Id.* ("The courts of this state recognize the jurisdictional importance of the distinction between direct and derivative actions."); *see also* 13 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5940 (2004) ("Since the derivative proceeding emerged as a creature of equity, a shareholder could not bring an action at law, even though the corporation could bring such an action or the only available remedy was damages.").
[13] *See Suplee*, 120 A.2d at 720.

General Assembly in § 18-1001 of the Delaware Limited Liability Company Act, which provides that:

> A member or an assignee of a limited liability company interest may bring an action *in the Court of Chancery* in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause the mangers or members to bring the action is not likely to succeed.[14]

In *Elf Atochem North America, Inc. v. Jaffari*,[15] our Supreme Court characterized this statute as a statutory grant of jurisdiction to this court over all derivative claims, even derivative claims that assert a limited liability company's purely legal rights.[16] Put simply, generations of this state's jurisprudence suggest that a derivative claim, by virtue of being derivative, is cognizable only in equity. To the extent that there is any confusion about that, the General Assembly has expressly legislated that derivative claims brought on behalf of limited liability companies can be heard here.

The Operating Entities' motion is primarily directed at the question of whether this court can exercise discretionary jurisdiction under the clean-up doctrine over a separately-pled ejectment count. In support of their contention that this court cannot do so, the Operating Entities rely on a recent bench ruling in *Charles H. West Farms, Inc. v. Humes*,[17] in which Vice Chancellor Noble dismissed the plaintiff's ejectment claims, among others.

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[14] 6 *Del. C.* § 18-1001.
[15] 727 A.2d 286 (1998).
[16] *Id.* at 295. In dictum, the Supreme Court noted that "[s]uch a grant of jurisdiction may have been constitutionally necessary if the claims do not fall within the traditional equity jurisdiction." *Id.* This aside may be explained by the tangential nature of that issue in *Elf Atochem* and therefore the absence of any citation by the parties to precedent such as *Lutz*, *Burry Biscuit*, or *Richardson*, all of which hold that derivative claims fall within the traditional boundaries of this court's equitable jurisdiction.
[17] C.A. No. 1694-K (Del. Ch. Mar. 28, 2006).

That reliance is misplaced. For one thing, the equitable nature of Theresa's derivative claim provides an independent basis for jurisdiction. Therefore, this court need not rely on the clean-up doctrine to assert jurisdiction. Moreover, in the *Humes* decision, Vice Chancellor Noble expressly recognized that he had discretion under the clean-up doctrine to hear the plaintiff's legal claims, presumably, including the plaintiff's ejectment claim.[18] He merely declined to exercise that discretion, primarily because in the same ruling, he dismissed all of the plaintiff's arguably equitable causes of action for failure to state a claim.[19] That decision is best viewed as reflecting the fact that judges of this court are more reluctant to exercise discretionary jurisdiction over legal claims after the equitable claims have been resolved or have become moot, especially when those claims are resolved at an early stage, such as by a motion to dismiss.[20]

The clean-up doctrine is an important feature of our law that prevents this court and the Superior Court from having to use cases (and the litigants involved) as shuttlecocks in wasteful games of judicial badminton.[21] But in cases like *Humes*, retaining jurisdiction over the legal claims does little to promote the efficiency rationale underlying the clean-up doctrine.[22] By contrast, in cases like this one where the equitable claims are central, those efficiency interests weigh strongly in favor of hearing all of the claims in one forum.

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[18] Transcript of *Humes* Bench Ruling at 11-12.
[19] *Id.*
[20] *See, e.g., Midland Food Services v. Castle Hills Holdings*, 1999 WL 669324, at *3 (Del. Ch. 1999), *aff'd*, 782 A.2d 265 (Del. 2001).
[21] *See Getty Refining and Marketing Co. v. Park Oil, Inc.*, 385 A.2d 147, 149 (Del. Ch. 1978). (describing the rationales underlying the clean-up doctrine).
[22] *See* WOLFE & PITTENGER at §2-4 (noting that this court is less likely to exercise discretionary jurisdiction where the equitable claims have fallen away and "the proceedings have not progressed

In determining whether to exercise clean-up jurisdiction over the ejectment count, past decisions instruct this court to ask whether that claim is so intertwined with the equitable counts "as to make it undesirable or impossible to sever [it]."[23] Although I need not rely on the clean-up doctrine, I note that an exercise of discretionary jurisdiction would be appropriate here because Theresa's ejectment count is founded upon her properly-pled breach of fiduciary duty claim. In this regard, the ejectment count is atypical of such claims in that there is no dispute in this case over the legal title to the land.[24] All of the parties agree that JJ&B owns it. The Operating Entities contend that they are occupying the land because JJ&B has orally agreed to let them. Theresa, on behalf of JJ&B, seeks to establish that JJ&B is entitled to possession by reason of the fact that whatever oral agreement supposedly exists between JJ&B and the Operating Entities is unenforceable because it is a product of unfair dealing by the parties controlling JJ&B. That is, in order to prove her ejectment claim, Theresa must prove a breach of fiduciary duty. That fiduciary duty claim will be heard and resolved in this court, and it would simply serve no purpose to require her to go elsewhere to obtain an order requiring the Operating Entities to get out, if that be justified by the record and necessary to protect JJ&B's interests.

As to this point, one must confront an argument that the Operating Entities hint at but do not squarely make, which is that Delaware's ejectment statute prohibits this court from

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to the point where prejudice and inefficiency would result from discontinuing the pending proceeding").

[23] *E.g., Clark v. Teveen Holding Co.*, 625 A.2d 869, 882 (Del. Ch. 1992).

[24] A common law cause of action for ejectment requires a plaintiff to prove two elements: (1) that it is out of possession; and (2) that it is entitled to possession. *E.g., Old Time Petroleum Co. v. Tsaganos*, 1978 WL 4973, at *3 (Del. Ch. 1978). The Operating Entities have not argued that Theresa has failed to plead a claim of ejectment, and I therefore do not address the substance of the claim.

hearing Theresa's ejectment claim even in circumstances when: 1) Theresa was required under long-standing precedent to bring her derivative claims in this court; 2) her request for ejectment is premised on the ground that the occupant of the disputed property is occupying it as a result of unfair self-dealing, a classically equitable claim; and 3) the ejectment claim is a smaller, but closely related part, of a larger case that involves clearly equitable claims. I accept for purposes of this decision the notion that the General Assembly may decide that particular statutory claims are beyond the reach of this court's clean-up jurisdiction or may craft a statute that requires even derivative plaintiffs to bring particular legal claims only in a certain law court (or requiring derivative plaintiffs to proceed with a legal claim in the law court after first obtaining a right to sue by order of this court). But more than the mere statutory indication that a particular claim will ordinarily be brought in a law court, which is all that the ejectment statute indicates,[25] is necessary to show an intent to divest this court of its traditional jurisdiction. Indeed, this court can confidently presume that the General Assembly is familiar with this court's long-standing exercise of clean-up jurisdiction and assumes that this court can handle claims that are ordinarily decided in law courts when traditional doctrines of equitable jurisdiction allow. In this respect, the venerable authority requiring plaintiffs to bring derivative suits involving underlying legal claims in this court also must be considered something that the General Assembly understands. Even more confidently, one may safely conclude that the General Assembly knew that derivative

[25] The ejectment statute, 10 *Del. C.* § 6701, states in relevant part: "The legal title to lands . . . may be tried in a civil action, based upon a cause of action in ejectment. The action shall be begun by filing [a complaint] in the office of the Prothonotary of the county in which the lands . . . lie."

plaintiffs might press legal claims on behalf of limited liability companies in this court, as made clear by § 18-1001 of the Limited Liability Company Act.

Nothing in the ejectment statute suggests that this court may not hear an ejectment action when it is brought derivatively on behalf of a limited liability company, when the grounds for ejectment rest on an asserted breach of fiduciary duty,[26] and when the ejectment claim is clearly ancillary to the rest of the plaintiff's claims, all of which sound in equity. Indeed, 35 years ago, the Supreme Court assumed that ejectment claims could be heard in this court if they were sufficiently related to viable equitable claims so as to implicate this court's clean-up jurisdiction.[27] Here, the Operating Entities have not cited to any provision of the ejectment statute suggesting that the General Assembly intended that ejectment claims may never be heard in this court.[28] Rather, long-standing jurisdictional doctrines and

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[26] To the extent that JJ&B's right to possession of the land turns on issues of unfair dealing, her ejectment count seems to more closely resemble a traditionally equitable cause of action rather than a purely legal ejectment claim. As stated, because the Operating Entities have not moved to dismiss the ejectment count for failure to state a claim, I decline to consider whether Theresa's contentions along these lines even amount to a valid cause of action for ejectment in the first instance. *Cf. Nelson v. Russo*, 844 A.2d 301, 302-03 (Del. 2004) (stating that in determining whether a court has subject matter jurisdiction over a claim, the court should "look beyond the language in the complaint to determine the true nature of [the plaintiff's] claim and the desired relief").

[27] *Burris v. Wilmington Trust Co.*, 301 A.2d 277, 279 (Del. 1972) ("We do not feel that any of the ejectment actions are sufficiently ancillary to the [equitable claims] so as to bring them within the jurisdiction of the Court of Chancery.").

[28] Arguably, by contrast, the Landlord-Tenant Code establishes a clear requirement that cases for summary possession be brought only in the Justice of the Peace Court because it establishes a very precise requirement for venue in such cases. *See* 25 *Del. C.* § 5701 ("An action for summary possession . . . shall be maintained in the Justice of the Peace Court . . . which is closest to the premises or commercial rental unit and in the same county."). But even as to that statute, no decision of this court squarely answers whether claims for summary possession may be maintained in this court if they fall within this court's clean-up jurisdiction, although they can be read as inclining in that direction. *See Bauer v. Gilpin*, 1994 WL 469220, at *3 (Del. Ch. 1994) (holding that this court lacked jurisdiction when the plaintiffs' only equitable claim (one for specific performance) was no longer viable and the defendants' counterclaims dealing with a lease agreement all fell within the jurisdiction of the Justice of the Peace Court); *Carriage Realty*

§ 18-1001 of the Limited Liability Company Act allow this court to hear them. For that reason, I deny the Operating Entities' motion. IT IS SO ORDERED.

Partnership v. All-Tech Automotive, Inc., 2001 WL 1526301, at *7-8 (Del. Ch. 2001) (refusing to allow a party to argue for the first time as a defense to equitable claims that a lessee had failed to pay required nominal rent when the lessor had not sought summary possession for breach of the lease in the Justice of the Peace Court before the Chancery case was begun); *Tsaganos v. The Liquor Exchange, Inc.*, 2004 WL 1254166, at *1-2 (Del. Ch. 2004) (deciding certain equitable claims relating to a lease agreement and declining to hear others because they were integral to a summary possession action that was concurrently pending in the Justice of the Peace Court).