

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

HLSP HOLDINGS CORP.,)
)
 Plaintiff,)
)
 v.)
)
FORTUNE MANAGEMENT) C.A. No. 08C-08-175 WCC
INC.,)
)
 Defendant.)
)
)
)

Date Submitted: November 3, 2008
Date Decided: March 31, 2009

On Defendant’s Motion for Summary Judgment. **GRANTED.**

MEMORANDUM OPINION

Norman M. Monhait, Esq., 919 Market Street, Suite 1401, Citizens Bank Center, Wilmington, DE 19801. Counsel for Plaintiff.

David A. Jenkins, Esq., Michele C. Gott, Esq., 800 Delaware Avenue, P.O. Box 410, Wilmington, DE 19899. Counsel for Defendant.

CARPENTER, J.

I. Introduction

Before this Court is Defendant Fortune Management, Inc's ("Fortune") Motion for Summary Judgment filed against Plaintiff HLSP Holdings Corporation ("HLSP"). Upon review of the record and briefs filed in this matter, the Court hereby grants the motion.

II. Background

A. Facts

HLSP was a Puerto Rico corporation with its principal place of business in San Juan, Puerto Rico. It was a private equity management firm created in March 2005 by investment bankers and private equity professionals. The firm had five shareholders: Jack Takacs (the company's sole director and President), Paul Bagley, Hermann Seiler, Gary Leonard and Donald Jackson. Although HLSP was successful within the private equity industry, it sought expansion through a public listing on a major stock exchange.¹

Fortune is a Delaware corporation with its principal place of business in Zug, Switzerland. Its stock is publicly traded on the Frankfurt Stock Exchange. In the summer of 2005, HLSP and Fortune entered into business negotiations. According to HLSP, it sought to enhance its growth prospects through a public

¹ Compl., Docket Item ("D.I.") 1.

listing and Fortune was interested in adding a private equity division to its asset management business in hopes of attracting investors to its investment funds and related products.²

This action arises from an agreement that the parties entered into on July 7, 2005 (the “Agreement”) whereby HLSP transferred all of its assets to a subsidiary of Fortune in exchange for 33,584,600 shares of Fortune common stock (the “Stock”). The parties intended the exchange to constitute a tax-free reorganization.³ In the Agreement, the parties agreed that HLSP would liquidate and distribute the Stock to its shareholders “[p]romptly following the Closing Date.”⁴ The Agreement also required Fortune, following the closing date, to take all necessary actions to cause the Stock to be registered and freely tradable on the Frankfurt Stock Exchange.⁵

On or about September 6, 2005, the Stock was transferred from Fortune and deposited into an account in the name of HLSP.⁶ In March 2006, HLSP distributed the Stock to its five shareholders even though Fortune had not yet registered the

² Compl. at ¶¶9-13.

³ Section 2.1 of the Agreement, D.I. 5.

⁴ Section 3.8 of the Agreement.

⁵ Section 3.6 of the Agreement.

⁶ Bagley Aff. 3, D.I. 5.

Stock. The Stock was transferred from the HLSP account to the shareholders' respective private accounts⁷ with a portion of the Stock being retained by HLSP to pay its creditors. Those creditors were paid by September, 2006.

During the fourth quarter of 2006 and the first quarter of 2007, the price of Fortune's stock rose to over € 4.00 per share on the Frankfurt Stock exchange. Unfortunately, the Stock acquired by HLSP did not become freely tradable until August 24, 2007 by which time the price of Fortune's stock had dropped to less than € 1.00 per share.

HLSP now claims that Fortune breached its obligations under the Agreement because it did not take all necessary actions to cause the Stock to be registered and freely tradable on the Frankfurt Stock exchange until August 2007. It claims that it suffered damages in excess of € 40 million because it was unable to sell the Stock when it was trading at a high price. It claims that it has standing to bring this suit based on its status as a contracting party.

In response, Fortune claims that HLSP lacks standing to bring this suit because it did not suffer any damages. It argues that HLSP never had the right to sell the Stock and thus, any alleged injuries would have been suffered by the

⁷ The Stock belonging to HLSP shareholder Gary Leonard was temporarily left in HLSP's account but Leonard exercised ownership rights over his shares remaining in the account. Sometime prior to September 11, 2006, Leonard's Stock was transferred from the HLSP account into his private account.

individual HLSP shareholders that received the Stock, not HLSP. For this reason, Fortune argues that the Complaint fails to state a claim on which relief can be granted.

III. Standard of Review

The Court may grant summary judgment if it concludes that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.”⁸ The moving party bears the initial burden of showing that no material issues of fact are present.⁹ Once such a showing is made, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact in dispute.¹⁰ In considering a motion for summary judgment, the Court must view the record in a light most favorable to the nonmoving party.¹¹ Summary judgment will not be granted when a more thorough inquiry into the facts is necessary to clarify the application of the law to the circumstances.¹²

⁸ Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

⁹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

¹⁰ *Id.* at 681.

¹¹ *Burkhart*, 602 A.2d at 59.

¹² *Phillips-Postle v. BJ Prods., Inc.*, 2006 WL 1720073 (Del. Super. Apr. 26, 2006) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

IV. Discussion

Fundamental to having standing to bring a cause of action in the Superior Court is the requirement that the plaintiff has suffered monetary injury caused by the party that they are attempting to sue.¹³ Upon review of the record and briefs, the Court finds that HLSP has failed to state a recoverable claim because it alleges no set of facts upon which a jury could reasonably conclude that it suffered injury as a result of Fortune's delay in registering the Stock. In addition, the Court finds that HLSP is not conferred standing solely by virtue of its status as a contracting party in the absence of any showing of injury.

HLSP claims that during the fourth quarter of 2006 and the first quarter of 2007 the Stock price rose to over € 4.00 per share on the Frankfurt Stock Exchange, and that its inability to sell the Stock during that lucrative period caused it injury. The Court finds this claim to be deficient for two reasons.

First, HLSP could not have benefitted from the high Stock price during the relevant time period (or any other time for that matter) because it never had the right to sell the Stock. Pursuant to the Agreement, HLSP was required to liquidate and distribute the Stock to its shareholders promptly after the closing date. Any

¹³ *Murphy v. United Servs. Auto Ass'n.*, 2005 WL 1249374 (Del. Super. May 10, 2005) (citing *Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 690 (E.D. Pa. 1973)).

attempt by HLSP to sell the Stock rather than distribute it to its shareholders would have been in clear contravention of the Agreement. Furthermore, HLSP makes no contention that it even attempted to sell the Stock. According to Paul Bagley, one of the five HLSP shareholders, “it was understood that HLSP would not attempt to sell the Fortune Stock because that would have been inconsistent with the tax free reorganization of HLSP.”¹⁴ Second, even assuming that HLSP had the right to sell the Stock, which it clearly did not, it would have lost that right in March 2006 when it distributed the Stock to the private accounts of its shareholders. Put simply, HLSP could not have suffered damages due to its inability to sell stock that: (1) it never had the right to sell; (2) it did not possess during the relevant time period; and (3) when they possessed the stock it was still increasing in value.

HLSP argues for the first time in its responsive brief that Fortune’s failure to register the Stock severely impaired the value of the Stock *before* it was distributed to the HLSP shareholders and creditors.¹⁵ However, even if the Court accepts this assertion, there remains the fundamental flaw of the Plaintiff’s argument that the Stock had no value to the company as they were required to distribute it to the shareholders. There is no assertion that the failure to register the Stock in some

¹⁴ Bagley Aff. 3.

¹⁵ HLSP Resp. Br. at 2, D.I. 9.

manner affected HLSP's ability to complete the tax free reorganization with Fortune. There is simply nothing to support HLSP's assertion that it was injured at any time by the conduct of Fortune, even though it appears there was no logical or rational basis for Fortune to delay the Stock registration. The Court notes that it can find no explanation for Fortune's failure to appropriately register the stock as required by the Agreement, particularly since at least three HLSP shareholders worked for Fortune after the parties entered into the Agreement and Mr. Bagley became the Chairman of Fortune's Board of Directors and Mr. Takacs was the President of Fortune. As such, the Court can only surmise the failure to register the Stock was the result of an internal dispute between the principals of these two small companies and personal bickering between the five shareholders of HLSP. To complain now that Fortune failed to timely register this Stock when at least two of the shareholders had management positions with Fortune - which appear could have mandated such actions - calls into question the Plaintiff's motives in bringing this action. In any event, HLSP obtained the Stock it was entitled to receive under the Agreement, and the failure to promptly register the Stock had no economic effect upon HLSP.

At oral argument, HLSP attempted to cast its claim in the context of a derivative suit. The Court does not agree with that characterization. In *Tooley v.*

Donaldson, Lufkin & Jenrette, Inc.,¹⁶ the Delaware Supreme Court held that in determining whether a cause of action is direct or derivative, the Court should consider two questions: (1) who suffered the alleged harm (the corporation or the shareholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the shareholders, individually)?¹⁷ If the corporation alone suffers injury, rather than the individual shareholder, the corporation is entitled to recover and the claim is derivative.¹⁸ If, however, the injury to the shareholder is independent of any injury to the corporation, the shareholder is entitled to individualized recovery and the cause of action is direct.¹⁹

The cause of action in this case is direct, not derivative, because the shareholders of HLSP suffered injury separate and distinct from HLSP. During the fourth quarter of 2006 and the first quarter of 2007 when the Stock was at its greatest value, HLSP had already distributed the Stock to the private accounts of its shareholders. This distribution and the subsequent settlement with HLSP creditors led to the dissolution of the corporation in the fall of 2006. Thereafter, any depression in the Stock price injured the individual shareholders directly, not

¹⁶ 845 A.2d 1031, 1033 (Del. 2004).

¹⁷ *Id.*

¹⁸ *Id.* at 1036.

¹⁹ *Id.* at 1039.

through the filter of HLSP. During the fourth quarter of 2006 and the first quarter of 2007, the five HLSP shareholders held the Stock in their private accounts and they alone had the right to sell that Stock. Thus, any injury related to the marketability of the Stock during that time was suffered directly by the HLSP shareholders, not HLSP.²⁰ For that reason, the right to bring this suit lies with the individual shareholders, not with HLSP. Consequently, Fortune's Motion is **GRANTED.**

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

²⁰ The right of HLSP shareholders to bring suit on these claims is acknowledged in the moving papers of both parties. Furthermore, the Court finds Section 3.9(b) of Agreement to be instructive.