

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2184

BRIAN A. EISEN,

Intervenor - Appellant,

v.

DCG&T, f/b/o Jack Battaglia/IRA; JACK BATTAGLIA; DCG&T f/b/o Lori Battaglia/IRA,

Plaintiffs - Appellees,

and

GLADE M. KNIGHT; MICHAEL S. WATERS; ROBERT M. WILY; BRUCE H. MATSON; JAMES C. BARDEN; APPLE REIT NINE, INC., now known as Apple Hospitality REIT, Inc.,

Defendants - Appellees,

KRISTAN GATHRIGHT; JUSTIN KNIGHT; DAVID MCKENNEY; BRYAN PERRY; DOES 1-10,

Defendants.

No. 15-2262

DCG&T, f/b/o Jack Battaglia/IRA; JACK BATTAGLIA; DCG&T f/b/o Lori Battaglia/IRA,

Plaintiffs - Appellants,

v.

BRIAN A. EISEN,

Intervenor - Appellee,

and

GLADE M. KNIGHT; MICHAEL S. WATERS; ROBERT M. WILY; BRUCE H. MATSON; JAMES C. BARDET; APPLE REIT NINE, INC., now known as Apple Hospitality REIT, Inc.; KRISTAN GATHRIGHT; DAVID MCKENNEY; JUSTIN KNIGHT; BRYAN PERRY; DOES 1-10,

Defendants.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. John A. Gibney, Jr., District Judge. (3:14-cv-00067-JAG)

Submitted: April 29, 2016

Decided: May 13, 2016

Before KING, FLOYD, and THACKER, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Michael L. Donner, Sr., CARRELL BLANTON FERRIS & ASSOCIATES, PLC, Richmond, Virginia, for Appellant/Cross-Appellee. Jeffrey Hamilton Geiger, SANDS ANDERSON PC, Richmond, Virginia; Kevin Peter Roddy, WILENTZ, GOLDMAN & SPITZER, PA, Woodbridge, New Jersey, for Appellees/Cross-Appellants. Elizabeth F. Edwards, MCGUIREWOODS, LLP, Richmond, Virginia; Charles William McIntyre, Jr., MCGUIREWOODS, LLP, Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Brian A. Eisen appeals from the district court's order approving the settlement of a shareholder derivative action filed by Jack Battaglia and DCG&T, for the benefit of the IRAs of Jack and Lori Battaglia (collectively "Plaintiffs"), against the directors and officers of Apple REIT Nine, Inc. now known as Apple Hospitality REIT, Inc. The Plaintiffs cross-appeal, asserting that Eisen lacked standing to challenge the settlement in the district court and lacks standing to appeal. Pursuant to section 13.1-735.1(A) of the Code of Virginia, once a stockholder signs and returns an appraisal form seeking fair value for his shares, he loses all right as a shareholder and the appraisal becomes his only remedy.* Va. Code Ann. § 13.1-735(A); see Adams v. U.S. Distrib. Corp., 34 S.E.2d 244 (Va. 1945).

Accordingly, once Eisen opted to pursue his appraisal rights, he no longer had standing to challenge the settlement of the shareholder derivative action, and he does not have standing to appeal from the settlement of that action. See Lujan v.

* Eisen is a member of the class that will receive a distribution under the terms of the settlement. However, as was discussed during the Fairness Hearing in the district court, any recovery Eisen receives from the settlement will likely be applied against the value he receives for his shares in the appraisal action because the appraisal proceeding is Eisen's exclusive remedy. See Adams, 34 S.E.2d at 245.

Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (discussing elements of standing). We therefore dismiss appeal No. 15-2184. In light of the dismissal of Eisen's appeal, we dismiss as moot appeal No. 15-2262. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED