

Background

CHCS is a Maine corporation doing business in Bangor, Maine. New England Home Healthcare (herein “NEHHC”) is a Maine corporation and provides health staffing services out of Bangor, Maine. EMC and Fleet Bank as Successor Trustee to Maine National Bank Trustee of the Endowment Fund of Community Health and Counseling Services (of which CHCS is the single trust beneficiary) each hold a fifty percent share of NEHHC. On November 6, 1984 CHCS executed a revocable trust with Maine National Bank¹ and placed shares representing its one-half interest in NEHHC into the trust. By April 18, 2001, the trust agreement was amended and the trustee’s power over the shares was reduced.

EMHS is a Maine corporation doing business in Bangor, Maine. It has among its subsidiaries EMH, EMC and AHS. AHM is a Maine corporation engaged in hospital management services doing business in Bangor, Maine. AHS is AHM’s single shareholder. Hews was a member of NEHHC’s Management Committee. Hews was and is the president of AHS. Coffey was, and is, the treasurer of AHS, EMH, EMHS as well as the president of EMC. Professional Health Staffing Services (herein “PHSS”) came into existence on March 21, 2000 as a “mark” applied for by AHM. PHSS provided temporary healthcare staffing services statewide. CHCS filed a Complaint in December 2003 alleging that by creating a direct competitor to NEHHC (of which it owns fifty percent of the shares), all of the Defendants breached certain fiduciary duties to NEHHC and CHCS. Such duties included candor, good faith and fairness in dealing with CHCS and NEHHC. CHCS alleges that that by creating PHSS, the Defendants have endangered the viability of NEHHC by taking work opportunities that could be filled by NEHHC, contributing to the labor shortage, diluting the labor pool, forcing up wages

¹ Fleet National Bank later replaced Maine National Bank as trustee.

and increasing labor costs. During the years of PHSS's operation by the Corporate Defendants, PHSS operated at a loss of \$194,833.25. CHCS is requesting an injunction and the imposition of a constructive trust with respect to any assets received by the Defendants from either the operation or sale of PHSS.

Discussion

A. Standard of Review

A party is entitled to summary judgment when the record shows that there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c); see also Darlings v. Ford Motor Co., 2003 ME 21, ¶ 14, 817 A.2d 877, 879. Essentially the Court determines whether there is a genuine issue of material fact by comparing the parties' statements of material facts and corresponding record references. Corey v. Norman, Hanson & DeTroy, 1999 ME 196, ¶ 8, 742 A.2d 933, 938. The Court will view the evidence in light most favorable to the non-moving party. See Steeves v. Bernstein, Shur, Sawyer & Nelson, P.A., 1998 ME 210, ¶ 11, 718 A.2d 186.

B. Defendants' Alternative Motions for Summary Judgment

The Defendants argue in their alternative motions for summary judgment that CHCS lacks standing because it does not directly own its share of the NEHHC stock. Generally, the plaintiff has the burden of proving standing. Fink v. Golenbock, 680 A.2d 1243, 1253 (Conn. 1996). Standing means "that an individual has a sufficient personal stake in the controversy to obtain judicial resolution." Maine Civil Liberties v. South Portland, 1999 ME 121, ¶ 8 n.5, 734 A.2d 191, 194 n.5. Corporations are distinct entities and stockholders do not have the power to represent a corporation. 18 AM. JUR. 2d *Corporations*, § 42.

Maine has not addressed the issue of whether a trust beneficiary has standing to bring an action as a shareholder. However, other jurisdictions have dealt with this issue and generally refer to it as the “contemporaneous ownership rule.” These cases are persuasive and the Court will not deny CHCS standing because of its beneficiary status.

In Carey v. Landis, 15 Pa. D. & C.3d 17 (Pa. C. 1980), Pennsylvania held that while it is the general rule that only shareholders have the right to bring a derivative action, the owner of an equitable interest in the corporate stock is likewise entitled to maintain an action. Id. at 20. In that case, the plaintiffs were beneficiaries of a decedent’s trust and had to define their “equitable interest” in the stock. Id. Since the stock had not yet become part of the trust res, the court held that the plaintiffs there did not have enough of an equitable interest to maintain a derivative suit. Id. at 21.

In addition to Pennsylvania; California, New York and Delaware allow trust beneficiaries to maintain actions as shareholders. See Pearce v. Superior Court of Kern County, 197 Cal. Rptr. 238, 241 (Cal. Ct. App. 1983); Sasso v. Gallucci, (447 N.Y.S.2d 618 (N.Y. Sup. Ct. 1982); Stephenson v. Landegger, 337 F. Supp. 591 (S.D.N.Y. 1971) *affd.* 464 F.2d 133 (2d Cir. 1971), *cert. den.* 409 U.S. 1039 (1972); Schlegel v. Schlegel Mfg. Corp., 258 N.Y.S.2d 587 (N.Y. App. Div.1965) and Clark v. Kelly, No. 16780, 1999 Del. Ch. LEXIS 148 (Del. Ch. June 24, 1999).

Walsh v. City of Brewer, 315 A.2d 200 (Me. 1974), while not controlling is instructive. The plaintiff was seeking to obtain a license to build a mobil home park on land that was owned by his mother and wife. Id. at 206. The Court sustained the City’s appeal and ruled that the plaintiff did not have standing, because he was not the actual owner of the land. Id. at 205-06. In reaching this conclusion, the Law Court examined the relationship that the plaintiff had with the property in question. Id. at 207. Concluding that the relationship was not “sufficiently

germane”, the Law Court denied the plaintiff standing. Here, CHCS does have a “sufficiently germane” relationship with the NEHHC shares, both before and after any alleged amendments to trust agreement. At all pertinent times, the shares were a part of the trust res and it appears that the trust is simply a holding capacity that does not involve the day-to-day operation of NEHHC. CHCS has a sufficiently germane relationship with the shares and should not be denied standing for lack of ownership. Defendants’ Alternative Motions for Summary Judgment must be denied.

C. Defendants’ Motions for Summary Judgment

1. *There are no fiduciary duties between the Corporate Defendants and Defendant Coffey and CHCS as a mere shareholder.*

The Defendants argue that there are no fiduciary duties between them and CHCS as a mere shareholder. “[T]he directors and officers of a corporation shall exercise their powers and discharge their duties in good faith with a view to the interests of the corporation and of the *shareholders.*” 13-A M.R.S.A. § 716 (Supp. 2003) (emphasis added).² When a closely held corporation is managed by its shareholders, the heightened duties of section 716 are applied to them. See Moore v. Maine Indus. Serv. Inc., 645 A.2d 626, 628 (Me. 1994). However, neither CHCS nor EMC are managing shareholders. NEHHC is managed by its own management committee, in which only defendant Hews is a member. Ordinarily, unless the shareholder is a majority shareholder or active in the management of the corporation, the minority shareholder has no well defined duties to the remaining shareholders. See WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5713 (West 2004). In a

² 13-A M.R.S.A. § 716 was repealed effective July 1, 2003. However, the formation of PHSS occurred prior to this date. While procedural enactments will apply retroactively, *see infra* note 3, statutes affecting substantive right are to apply prospectively. Sinclair v. Sinclair, 654 A.2d 438, 439 (Me.1995) (citing Riley v. Bath Iron Works Corp., 639 A.2d 626 (Me.1994)); Reagan v. Racial Mortgage., Inc., 135 F.3d 37, 42 (1st Cir. 1998). Therefore the substantive duties imposed on directors and officers to a corporation as well as its *shareholders* under section 716 are applicable.

closely held corporation, common shareholders owe one another the same duties *in the operation of the corporation* that partners owe to one another. *Id.* As neither CHCS nor EMC manage NEHHC and neither are majority shareholders, the heightened fiduciary duties of section 716 cannot be imposed on EMC. The corporate veil will not be pierced solely for the purpose of finding a fiduciary relationship when one does not exist. *Id.* Furthermore, none of the defendants, with the exception of Hews, are directors or officers of NEHHC nor do any of them play a managing role in NEHHC. The heightened fiduciary duties of section 716 cannot apply between them and CHCS as a mere shareholder.

Defendant Hews, however, does owe fiduciary duties under section 716. Hews was both a member of NEHHC's management committee as well as the President of AHS. AHS was the sole owner of AHM and AHM created a direct competitor to NEHHC in the form of PHSS. There is a genuine issue of material fact concerning whether Hews, breached his duties to CHCS by not acting in good faith "with a view to the interests of the . . . shareholders and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions" when AHM, completely owned by a corporation (AHS) in which he was President, created a direct competitor (PHSS) to another corporation in which he was a member of its management committee (NEHHC). 13-A M.R.S.A. § 716.

2. *CHCS is required to bring a derivative suit against the Corporate Defendants and Coffey if they want to impose duties owed to NEHHC.*

CHCS must bring such an action in a derivative suit in order to maintain any possible action against the Corporate Defendants and Coffey on behalf of NEHHC. Maine Rule of Civil Procedure 23(A) states that a derivative suit must be filed in the Superior Court by one or more shareholders to "enforce a right of a corporation or association having failed to enforce a right by

which may be properly asserted by it” The Rule goes on to impose heightened standards on a complaint in such an action, such as particularized allegations. *Id.* The new Maine Business Corporation Act, 13-C M.R.S.A. § 101 et. seq. (2003) imposes additional requirements.³ *Id.* at § 751(1). A direct action is often preferred by litigants because it avoids these heightened procedural requirements.

CHCS, as a shareholder, has not instituted a derivative action and, instead has filed a direct suit for damages allegedly sustained by NEHHC. CHCS argues that it is not required to bring a derivative suit in this case, because it characterizes the relationship with EMC as a “partnership” rather than as two equal corporate shareholders. This argument is unsupported by any of the submissions in any of the pending motions. NEHHC is registered as a corporation, not as a partnership under the Maine Uniform Partnership Act. 31 M.R.S.A. § 281 et. seq. (Supp. 2003). 31 M.R.S.A. § 286 states that, “any association formed under any other statute of this State . . . is not a partnership under this Act. *Id.* While a corporation may be a partner in a partnership under 31 M.R.S.A. § 282(5), section 286 suggests that a corporation may not also be a partnership at the same time.

“There are two major, often overlapping, exceptions to the general rule that a shareholder cannot directly sue for injuries to his corporation: (1) where there is a special duty, such as a contractual duty, between the wrong doer and the shareholders, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders.” *Moore*, 645 A.2d at 629 (quoting *Forbes v. Wells Beach casino, Inc.*, 307 A.2d 210, 221 (Me. 1973)). Here, CHCS, with the exception of Hews, as discussed above, is not owed any special duties by the defendants and has not made any allegations in the original or the proposed amended Complaint

³ Although 13-C M.R.S.A. § 751 did not come into effect until July 1, 2003, it is a procedural rule and, thus, applies, retroactively, to all causes of action filed after it has taken effect. CHCS filed this action on December 2003, thus the procedural aspects of section 751 apply. *See supra* note 2.

that it has suffered a “separate and distinct” harm than that suffered by the other shareholder, EMC. There is no genuine issue of material fact as to CHCS’s standing in this case. CHCS has instituted a direct action on its own behalf for harm suffered by NEHHC. Such a case requires a plaintiff to file a derivative suit under M.R. Civ. P. 23(A) and 13-C M.R.S.A. § 751. CHCS has not done so, therefore Coffey and Hews’ motion for summary judgment must be granted for Coffey and denied as to Hews and the Corporate Defendants’ motion for summary judgment must be granted.

D. CHCS’s Motion to File First Amended Complaint

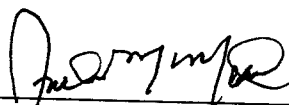
CHCS has filed a motion to amend the Complaint and filed an proposed amended Complaint on April 5, 2004. While leave to amend should be freely given when justice so requires, M.R. Civ. P. 15(a), the Court should deny the motion when the moving party fails to show how it could cure a complaint. See Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell, 1998 ME 70, ¶ 10, 708 A.2d 283, 286-87. The amended Complaint does not state a claim for a derivative action and does not offer any new independent, substantive theories of recovery. The amended complaint remains defective. In denying CHCS’ motion to amend, the Defendants’ amended answers are also stricken.

Conclusion

Defendants Coffey and Hews’ Motion for Summary Judgment is **DENIED** as to defendant **Hews** but **GRANTED** as to defendant **Coffey**. Defendant Coffey’s Motion to Dismiss is moot as the motion for summary judgment as to Coffey was granted. The Corporate Defendants’ Motion for Summary Judgment is **GRANTED**. The Defendants’ Alternative Motions for Summary Judgment are both **DENIED**. Plaintiff’s Motion to File First Amended Complaint is **DENIED**. Plaintiff’s Motion for Extension of Time to respond to Motions for

Summary Judgment is moot. Plaintiff's Motion for Consolidation/Extension Time to Respond to Motions for Summary Judgment is moot. The Corporate Defendants Motion to Strike CHCS's Opposing memorandum is moot.

DATED: October 14, 2004



Justice, Maine Superior Court
Andrew M. Mead

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SUPERIOR COURT
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Docket No BANSC-CV-2003-00222

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Filing Document: COMPLAINT

Filing Date: 12/05/2003

Minor Case Type: OTHER EQUITABLE RELIEF

Docket Events:

12/08/2003 FILING DOCUMENT - COMPLAINT FILED ON 12/05/2003
(EXHIBIT A ATTACHED)

12/08/2003 Party(s): COMMUNITY HEALTH AND COUNSELING SERVICES
ATTORNEY - RETAINED ENTERED ON 12/05/2003
Plaintiff's Attorney: KEVIN CUDDY

12/08/2003 CERTIFY/NOTIFICATION - CASE FILE NOTICE SENT ON 12/08/2003
TO PLAINTIFF'S ATTORNEY.