STATE OF MICHIGAN

COURT OF APPEALS

CRAIG C. STRICKLAND, Plaintiff-Appellant,	UNPUBLISHED December 15, 2011
v	No. 298756 Oakland Circuit Court
ART DOUGLAS, ED OPHOFF, FRED WAGNER, NANCY CHAPMAN, and MICHIGAN INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION, Defendants-Appellees.	LC No. 2009-103108-CZ

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff Craig Strickland appeals as of right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(5) and (10). We affirm.

I. BACKGROUND

This case involves claims by plaintiff that defendants Art Douglas, Ed Ophoff and Fred Wagner breached their fiduciary duties to the Michigan Independent Automobile Dealer Association (MIADA) by failing to pursue an investigation regarding a conflict of interest between defendant Chapman's company, AEC, Inc., and its contractual obligations with MIADA. Plaintiff also contends that defendant Nancy Chapman failed to disclose her interest in transactions involving AEC as a result of its contractual relationship with MIADA.[1]

After discovery, the MIADA defendants sought dismissal of plaintiff's complaint premised on two grounds: (1) plaintiff lacked standing because of his acquiescence to the contracts between MIADA and AEC and his failure to make the requisite demand on the Board to file a derivative suit, and (2) plaintiff's claims were barred by the business judgment rule. Defendant Chapman sought dismissal of the claims against her on the ground that she was in

[1] In the remainder of this opinion we will refer to defendants Douglas, Ophoff, Wagner and MIADA as the MIADA defendants.

compliance with the disclosure of material facts pertaining to the transactions between AEC and MIADA.

Plaintiff failed to file a response to the motion in accordance with the time strictures of the scheduling order, and after hearing arguments, the trial court granted the motion in a ruling from the bench:

> This matter is before the court on the plaintiff's [sic, defendants'] motion for summary disposition pursuant to MCR 2.116(C)(5), lack of standing and (C)(10), no genuine issue of material fact. Plaintiff, as former president of MIADA, brought the instant suit against defendants. Although plaintiff's complaint fails to specify the legal theory under which he is entitled to relief the court believes that plaintiff's complaint is in the form of a derivative suit.
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> Defendants raise a number of arguments as to why summary disposition is appropriate in this matter. Plaintiff has not filed a response as required by the court's February 18th, 2010 scheduling order. Plaintiff complains that there is a conflict of interest relative to the MIADA/AEC Management Agreement and the MIADA board of directors has ignored this conflict in breach of its fiduciary duties. However, it is undisputed that plaintiff has reviewed, voted for and approved the renewal of the AEC contract. Therefore, defendants contend plaintiff's – plaintiff lacks standing to bring this suit because he acquiesced to the contract which he now challenges. The court agrees. Support is found for this position in *Camden v Kaufman*, 240 Mich App 389 (2000).
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> Moreover, plaintiff has presented no evidence that a pre-suit demand was made on defendants. For these reasons the court will grant summary disposition pursuant to MCR 2.116(C)(5).
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> Even if plaintiff did have standing in this matter plaintiff has not presented sufficient evidence to overcome the business judgment rule. *See In Re Butterfield Estate*, 418 Mich 241 (1983). In the absence of fraud or bad faith this court cannot substitute its judgment for that of the corporate directors. The business judgment rule presumes corporate directors will act in good faith and in the best interest of the corporation and plaintiff has not overcome this presumption. Accordingly, summary disposition is appropriate pursuant to MCR 2.116(C)(10).
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> Lastly, as it relates to defendant Chapman, plaintiff has presented no evidence that Chapman has not discharged her burden pursuant to MCL 450.2545(c) and accordingly, summary disposition is appropriate under MCR 2.116(C)(10) relative to defendant Chapman.

Plaintiff's appeal followed from the trial court's entry of a final order of dismissal.

II. ANALYSIS

Plaintiff first challenges the trial court's determination that he lacked standing and the determination that his suit comprised a derivative action. The issue of a party's standing to sue

comprises a legal question that is reviewed de novo. *Crawford v Dep't of Civil Serv*, 466 Mich 250, 255; 645 NW2d 6 (2002). "In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(5), this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003) (internal quotations and footnote omitted). A trial court's decision regarding "the meaning and scope of pleadings" is reviewed for an abuse of discretion. *Taxpayers of Mich Against Casinos v Michigan*, 478 Mich 99, 105; 732 NW2d 487 (2007).

We first hold, as did the trial court, that plaintiff has brought a derivative claim against the MIADA defendants. This Court determines the gravamen of a party's claim based on a review of the entire claim. Dismissal cannot be avoided merely because of artful pleading. *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999). A "derivative action" is defined as "[a] suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary; esp., a suit asserted by a shareholder on the corporation's behalf against a third party (usu. a corporate officer) because of the corporation's failure to take some action against the third party." Black's Law Dictionary (9th ed). While plaintiff's complaint lacked a definitive heading identifying the type of claim pursued, he did indicate within the document that "Plaintiff sues in the right and for the benefit of MIADA." It is clear from the allegations contained in plaintiff's complaint that the wrongs asserted are being perpetrated against MIADA. Even plaintiff's assertion regarding his improper removal as president of MIADA is presented within the context that such an action was "not in the best interest of MIADA and [was] in fact and deed contrary to said best interests of MIADA." As such, the trial court properly determined that plaintiff's cause of action against the MIADA defendants was derivative in nature.

From that conclusion, the trial court properly dismissed the claims against the MIADA defendants because plaintiff suffered only a derivative injury, and thus lacked standing to sue. It is a basic precept that "[a]n action must be prosecuted in the name of the real party in interest." *Mich Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989), citing MCR 2.201(B). "In general, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee." *Id.* Two exceptions to this rule are recognized. First, "'[a] stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and distinct from that of other stockholders generally.'" *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 9; 444 NW2d 779 (1989), quoting 19 Am Jur 2d, Corporations, § 2245, p 147. It is permissible for an officer or stockholder to file suit individually if he or she "can show a violation of a duty owed directly to … [him] that is independent of the corporation[.]" *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003), citing *Mich Nat'l Bank*, 178 Mich App at 679. The second recognized exception, which permits a shareholder to initiate a lawsuit on an individual basis "does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally." *Mich Nat'l Bank*, 178 Mich App at 679-680.

"[W]here the alleged injury to the individual results only from the injury to the corporation, the injury is merely derivative and the individual does not have a right of action against the third party." *Mich Nat'l Bank*, 178 Mich App at 680. As each of the allegations contained in plaintiff's complaint pertain to an injury to MIADA and not to plaintiff personally,

the trial court correctly determined that the action was derivative and that plaintiff lacked standing to pursue the complaint. Plaintiff's assertion that his concerns regarding the existence of a conflict of interest between AEC and MIADA are legitimate and that others on the Board support his pursuit of this action are functionally irrelevant as, based on the allegations made, the lawsuit would have to be brought by MIADA rather than an individual member of its Board to meet the requirements of standing. MCR 2.201(B); *Mich Nat'l Bank*, 178 Mich App at 679-680.

An additional reason for upholding the dismissal of the claims against the MIADA defendants is that plaintiff, as a MIADA Board member, repeatedly voted to renew contracts with AEC and Chapman. "The general rule is that a shareholder who assents to a corporate transaction may not later challenge the validity of the transaction in court." *Camden v Kaufman*, 240 Mich App 389, 392; 613 NW2d 335 (2000), citing *Wallad v Access Bidco, Inc*, 236 Mich App 303, 305; 600 NW2d 664 (1999). As an exception to this general rule, "a plaintiff may maintain an action if it is demonstrated that complaining to the directors or requesting that they act differently would have been futile." *Id*. at 393. In this instance, plaintiff has not demonstrated that making further requests to the Board would have been futile, as the executive committee of MIADA's Board as previously authorized an investigation to determine the existence of a conflict of interest.

Finally, to maintain a derivative action "a prior demand for suit by a shareholder and refusal by the corporation" is required. *Eston v Argus, Inc*, 328 Mich 554, 556; 44 NW2d 154 (1950); see also MCL 450.2491; MCR 3.502(A). The trial court held that no prior demand was made, necessitating dismissal. To support his assertion that he has complied with the demand requirement, plaintiff points to correspondence forwarded by his attorney to the MIADA defendants.[2] However, the letter asserts personal wrongs committed against plaintiff and is a threat of legal action, rather than a demand that MIADA's Board of Directors undertake litigation. Consequently, this correspondence fails to meet the requirements or purpose of a demand letter. MCL 450.2491(2)(b). In addition, plaintiff admitted under oath that he did not submit a request to MIADA to initiate a lawsuit concerning the AEC contract. As the evidence was indisputable that plaintiff failed to provide a demand letter to MIADA to initiate litigation, the trial court correctly granted the MIADA defendant's motion for summary disposition on this basis.[3]

Finally, plaintiff contends that the trial court erred in finding that Chapman's disclosures met the requirements of MCL 450.2545(c). The disclosure requirements of MCL 450.2545(c) are that:

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[2] Although defendants dispute that this document was submitted in discovery, a review of plaintiff's deposition indicates that the letter was submitted and marked as an exhibit.

[3] Though we have concluded that plaintiff had no standing to sue the MIADA defendants, we note that plaintiff failed to present sufficient evidence to overcome the business judgment rule regarding his claims of breach of fiduciary duty by the individually named MIADA defendants. See *In re Butterfield Estate*, 418 Mich 241, 255; 341 NW2d 453 (1983); MCL 450.2541(1).

> A contract or other transaction between a corporation and 1 or more of its directors or officers, or between a corporation and a domestic or foreign corporation, domestic or foreign business corporation, firm, or association of any type or kind, in which 1 or more of its directors or officers are directors or officers, or are otherwise interested, is not void or voidable solely because of such common directorship, officership, or interest, or solely because such directors are present at the meeting of the board or committee thereof which authorizes or approves the contract or transaction, or solely because their votes are counted for such purpose if any of the following conditions is satisfied:
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> (a) The contract or other transaction is fair and reasonable to the corporation when it is authorized, approved, or ratified.
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> (b) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or known to the board or committee, and the board or committee authorizes, approves, or ratifies the contract or transaction by a vote sufficient for the purpose without counting the vote of any common or interested director.
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> (c) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or known to the shareholders or members, and they authorize, approve or ratify the contract or transaction.

There is no provision in the management agreement between AEC and MIADA that requires Chapman to disclose the profits realized by AEC to MIADA. The agreement between the entities is clear, has been repeatedly reviewed by the Board and affirmed on several occasions. There has been no evidence submitted that Chapman and AEC have not provided reports on a quarterly basis, or as demanded by the Board, consistent with the obligations delineated in the management agreement. As Chapman and AEC have complied with the requirements of MCL 450.2545(c), the trial court correctly held that plaintiff failed to establish a genuine issue of material fact regarding a failure to disclose.

Affirmed.

Defendants may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio