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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2097**

Nizar Abuzeni, et al.,
Appellants,
Cheryl Mutschler,
Appellant,

vs.

John Jay Mutschler, et al.,
Respondents,
Kurt Bragg, et al.,
Respondents,
Colleen Entrikin,
Respondent,
Larry Henrichs,
Respondent,
Robert Kramer,
Respondent,
Jason Mutschler,
Respondent,
Brian Seemann, et al.,
Respondents.

**Filed September 9, 2019
Affirmed in part, reversed in part, and remanded
Reyes, Judge**

Hennepin County District Court
File No. 27-CV-18-1233

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Considered and decided by Reyes, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

REYES, Judge

In this corporate-shareholder litigation, appellant-shareholders challenge the dismissal of (1) their claims seeking a corporate buyout, sale, or dissolution, arguing that they are direct claims and are not subject to Minn. R. Civ. P. 23.09¹ and (2) their contract-based claims, arguing that they comply with Minn. R. Civ. P. 8.01, and that the district court erred in dismissing them sua sponte. We affirm in part, reverse in part, and remand.

¹ Under rule 23.09, plaintiff-shareholders alleging derivative claims “must, among other things, allege with particularity the efforts . . . made . . . to obtain the desired action from the directors of the corporation and the failure of the corporation to take such action.” *In re Medtronic, Inc. S’holder Litig.*, 900 N.W.2d 401, 406 (Minn. 2017) (quoting Minn. R. Civ. P. 23.09).

FACTS

This matter involves 21 different entities, including corporations, limited-liability companies, and limited partnerships, engaged in real-estate enterprises. The entities own and manage properties that generate revenue, and many of them have a mix of different owners. Appellants and respondents are a mix of individuals and entities. The complaint grouped defendants into two different categories: “Culpable Defendants” (respondents) and “Non-Culpable Defendants.”²

Appellants’ complaint alleges that respondents, individually or jointly, engaged in “a host of wrongful acts” under common-law and Minnesota statutes. Factual allegations (b), (m), and (q), and count 8, relate to claims for access to corporate records. Factual allegations (d) and (g) provide, respectively:

[Respondents] [v]iolat[ed] resolutions of the Entities and agreements among members that, inter alia, required that budget, budget amendments, debt, debt servicing and debt restructuring be preapproved by members, partners or shareholders of the Entities, which were intended to prohibit the commingling, borrowing of money and engaging in other improper transactions using the Cookie Jar funds without the consent of Plaintiffs or the Non-Culpable Defendants.

[Respondents] [m]aliciously reduc[ed] or eliminat[ed] distributions to Plaintiffs and the Non-Culpable Defendants to further their self-dealing and/or in retaliation for some [appellants] questioning the actions of [respondents].

² Appellants did not allege any claims against the Non-Culpable Defendants but named them as parties because they held ownership interests that may be affected by the relief sought in this case.

Of the remaining factual allegations, (a), (c), (f), (j)-(l), and (p) claim that respondents misappropriated, comingled, and usurped entity funds, revenue, opportunities, debt proceeds, assets, and loan proceeds; (e) alleges that respondents violated the terms of resolutions and intercompany loans; (h) alleges that respondents misrepresented their financial gain from the entities' activities; (i) alleges that respondents misrepresented their intent to enter into agreements; (n) alleges that respondents engaged in numerous conflicts of interest with regard to the entities; (o) alleges that respondents violated the laws governing Realtors and real-estate brokers; and (r) alleges that respondents engaged in "other conduct that is known and which may be learned during discovery."

Based on the above allegations, appellants sought relief in counts 1, 2, and 9 for respondents' fraudulent, illegal, and unfairly prejudicial, breach of fiduciary duties toward appellants, and misapplication and waste of entity assets. Count 3 requested relief for breach of fiduciary duty. Count 4 sought relief for "[b]reach of contract agreements, including partnership agreements, shareholder agreements, member control agreements, operating agreements, resolutions, written actions, minutes, and other written and oral express and implied contracts." Count 5 requested a declaratory judgment to determine the parties' rights under the allegedly breached agreements, and counts 6 and 7 sought reformation and specific performance, respectively, based on "mutual mistake and/or intentional, deceitful, and malicious conduct." Count 8 requested "an accounting of all of the [e]ntities."

Respondents moved to dismiss, asserting that appellants' complaint alleged derivative claims that failed to comply with rule 23.09. Appellants filed a memorandum

in opposition to respondents' motion to dismiss. Appellants also moved to amend their complaint to clarify that the "original complaint [sought] a 'business divorce' in the form of a dissolution, forced buyout, sale, etc.," and to remove "any allegations [suggesting] that [appellants] are seeking money damages that would be derivative in nature." After a hearing on the motions, the district court issued an order granting appellants' motion to amend their complaint and respondents' motion to dismiss, except with respect to count 8, which is a direct claim for corporate records. This appeal follows.

D E C I S I O N

I. The district court erred by dismissing counts 1-3 and 9 in their entirety as derivative claims.

Appellants challenge the district court's dismissal of counts 1-3 and 9 as derivative, arguing that their claims for waste and misappropriation were direct because they were "asserted to obtain a forced buy-out, sale or dissolution without [asserting] any accompanying claims for money damages," and because the complaint asserted several other inherently direct claims. We agree that the district court erred in dismissing these counts entirely, but for different reasons.

We review de novo a district court's decision granting a motion to dismiss, *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013), considering only the facts alleged in the complaint, accepting those facts as true, and construing all reasonable inferences in favor of the nonmoving party. *Bahr v. Capella University*, 788 N.W.2d 76, 80 (Minn. 2010). Whether a shareholder's claims are direct or derivative presents a question of law subject to de novo review. *Medtronic*, 900 N.W.2d at 405.

As an entity distinct from its shareholders, a corporation holds a separate right to sue in its own name. *Singer v. Allied Factors, Inc.*, 13 N.W.2d 378, 380 (Minn. 1944). Thus, “Minnesota has long adhered to the general principle that an individual shareholder may not assert a cause of action that belongs to the corporation.” *Nw. Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 617 (Minn. 1995).

If a shareholder asserts a cause of action belonging to the corporation, the shareholder must seek redress in a “derivative” action on behalf of the corporation. *Wessin v. Archives Corp.*, 592 N.W.2d 460, 464 (Minn. 1999). By doing so, the shareholder, in effect, steps into the corporation’s shoes and seeks restitution that the shareholder could not demand on its own. *In re UnitedHealth Grp. Inc. S’holder Derivative Litig.*, 754 N.W.2d 544, 550 (Minn. 2008) (quotation omitted). In bringing a derivative action, the shareholder must, among other things, comply with the procedural requirements of Minn. R. Civ. P. 23.09. *Medtronic*, 900 N.W.2d at 406. A direct claim, on the other hand, alleges an injury to a shareholder that is not shared by the corporation. *Id.* The procedural requirements of rule 23.09 are inapplicable to direct claims. *Id.*

In analyzing whether a shareholder’s claim is direct or derivative, courts must focus on the alleged injury, not the theory in which the claim is couched. *Wessin*, 592 N.W.2d at 464. The supreme court has distilled the direct-versus-derivative inquiry to two questions: (1) who suffered the alleged injury and (2) who would receive the benefit of any recovery. *Medtronic*, 900 N.W.2d at 408.

A. Counts 1, 2, and 9 are partly derivative claims.

Factual allegations (a), (c), (d)-(f), (h)-(l), and (n)-(p) allege injuries in the form of misappropriation or comingling of corporate assets, which are “traditional derivative claims” that rightfully belong to the entities, *Wessin*, 592 N.W.2d at 465, because the injuries affect the entities in the first instance. These factual allegations form the basis for appellants’ requests for relief in counts 1, 2, and 9, to the extent that they allege that respondents “acted fraudulently, illegally, in a manner unfairly prejudicial . . . and misapplied and wasted assets.” Because it is undisputed that the amended complaint does not satisfy the requirements of rule 23.09, the district court did not err in dismissing counts 1, 2, and 9 to the extent that they are based on derivative-claim allegations.

B. Count 3 and portions of counts 1, 2, and 9 are direct claims.

Factual allegation (g) concerns the reduction or elimination of distributions to appellants and the Non-Culpable Defendants. “Distribution” is defined as “a direct or indirect transfer of money or other property, other than its own shares . . . *by a corporation to any of its shareholders* in respect of its shares.” Minn. Stat. § 302A.011, subd. 10 (2018) (emphasis added). Under this definition, only the shareholders would suffer the immediate harm of a reduction or elimination in their distributions. Even if a reduction or elimination in distributions affects all of the entities’ shareholders similarly, the claim is direct so long as the entities are not also affected by the alleged injury. *Medtronic*, 900 N.W.2d at 408-09.

Factual allegation (g) forms the basis for count 3 entirely, and counts 1, 2, and 9 to the extent that they allege that respondents “breached [their] fiduciary duties.” Because

rule 23.09 does not apply to these direct claims, the district court erred in dismissing them, and we remand this matter to the district court for proceedings on these counts.

C. The test for distinguishing a direct claim from a derivative claim is well-established in Minnesota law.

Appellants argue that *Medtronic* provides an additional basis for distinguishing between direct and derivative claims, namely, that claims seeking non-monetary equitable or declaratory relief are intrinsically direct “because there is no money for the entity to ‘recover.’” We are not persuaded. The direct-versus-derivative test focuses on only two factors: who suffered the alleged injury and who would receive the benefit of any recovery.

Appellants next argue that, by bringing their claims under direct-action statutes and specifically seeking equitable relief, their claims are “plainly direct.” Appellants’ argument is identical to that made in *Wessin*, where the Wessins asserted that their claims were direct simply because they were brought and specifically pleaded pursuant to Minn. Stat. § 302A.751, subd. 1(b). 592 N.W.2d at 465. The supreme court rejected this argument, noting that the Wessins’ assertion “ignores our prior precedent,” and that “plaintiffs cannot defeat the traditional derivative claim analysis by simply seeking personal relief.” *Id.* The same conclusion applies here.

II. The district court did not err in dismissing counts 4-7 for failing to satisfy the notice-pleading requirements of rule 8.01.

Appellants assert that the district court erred in sua sponte dismissing counts 4-7 for failure to comply with rule 8.01’s notice-pleading requirements, arguing that (1) the district court did not give appellants an opportunity to provide a more definite statement; (2) respondents did not raise rule 8.01 in its motion to dismiss; (3) counts 4-7 complied

with rule 8.01; and (4) the district court dismissed the counts before determining whether they were direct or derivative. We disagree.

We review de novo whether a corporate shareholder has sufficiently pleaded a direct or derivative claim to survive a motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e). *Medtronic*, 900 N.W.2d at 405. As a preliminary matter, the district court did not act sua sponte in dismissing counts 4-7. Respondents notified appellants in their opposition to appellants' motion to amend the complaint that counts 4-7 were drafted with so little particularity that they failed to provide them with fair notice of appellants' claims. Appellants had an opportunity to make a more definite statement, but maintained that their claims had been adequately pleaded. Because appellants had notice that counts 4-7 were insufficiently pleaded and refused to amend them, the district court did not act sua sponte in dismissing these counts.

A. Count 4 – Breach of Contract.

Appellants failed to adequately plead a direct claim for breach of contract. Factual allegation (d) states that the agreements at issue “were intended to prohibit the *comingling* [and] *borrowing of money*,” and this language suggests a traditional derivative claim. Furthermore, appellants' complaint fails to demonstrate how the alleged agreement violations resulted in harm separate and distinct from that suffered by the corporation.

B. Counts 5-7 – Declaratory Judgment, Reformation, and Specific Performance, respectively.

On count 5, appellants failed to identify the rights under the agreements referenced in count 4 for which they seek a declaratory judgment. As to count 6 for reformation based

on mutual mistake, appellants failed to plead that there was in fact a valid agreement sufficiently expressing the real intention of the parties. *See Theisen's, Inc. v. Red Owl Stores, Inc.*, 243 N.W.2d 145, 148 (Minn. 1976) (“Before a court of equity will interfere to reform a written instrument it must appear, *substantially as alleged in the pleadings*, that there was in fact a valid agreement sufficiently expressing in terms the real intention of the parties” (citation omitted)); *see also* Minn. R. Civ. P. 9.02 (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”). Finally, as to count 7 for specific performance, appellants repeated their pleadings from count 6, and failed to identify the obligation they seek to have remedied by specific performance.

Because appellants failed to sufficiently plead counts 4-7, the district court did not err in dismissing them.

Affirmed in part, reversed in part, and remanded.