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NO. COA01-372

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

BOLEND A B. DICKINSON,

Plaintiff,

v.

Mecklenburg County
No. 99 CVD 18835

KATHY A. PASTOR;
AESTHETICS EDUCATIONAL
INSTITUTE, INC.; AND
PROFESSIONAL SKINCARE SYSTEMS,
INC. d/b/a/ LAKE
NORMAN WELLNESS CENTER,

Defendants.

Appeal by plaintiff from order entered 11 December 2000 by Judge H. William Constangy in District Court, Mecklenburg County. Heard in the Court of Appeals 23 January 2002.

John F. Hanzel, P.A., by John F. Hanzel, for plaintiff-appellant.

*Kathy A. Pastor, pro se.
No brief for defendants-appellants.*

WYNN, Judge.

In July 1999, Bolenda Dickinson invested in the formation of Aesthetic Educational Institute, Inc. to engage in the business of educating skin care professionals through instructional classes. The corporation consisted of five shareholders and four directors--

Kathy Pastor (President, Director), Kimberly Phillip (Vice President, Director), Pamela Sholar (Director), Dickinson (Treasurer, Director), and Karen Rhodes (Secretary). Dickinson contends that the shareholders were to fund the corporation at \$50,000 pro rata to their shareholdings--Pastor (30%), Phillip (30%), Sholar (10%), Dickinson (20%) and Rhodes (10%). However, Dickinson alleges that while she contributed \$10,000, only \$15,000 in actual cash was invested into the company. Dickinson further contends that although the corporation made lease payments to Lake Norman Wellness Center, no classes ever took place. She also states that Pastor refused to allow her to inspect Aesthetic Educational Institute's checkbook. Ultimately, she discovered that large sums of money had been transferred from Aesthetic Educational Institute's account to Pastor and Lake Norman Wellness Center.

In December 1999, Dickinson brought this action directly against defendants--Pastor, Aesthetic Educational Institute Inc., and Professional Skincare Systems, Inc. d/b/a/ Lake Norman Wellness Center--alleging claims for: (I) conspiracy, fraud and misrepresentation; (II) unfair and deceptive trade practices; (III) interference with actual and prospective economic advantage; (IV) conversion; (V) breach of fiduciary duty; (VI) constructive trust; (VII) relief accounting; and (VIII) injunctive relief. However, the trial court dismissed her complaint under "Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because the claims brought by plaintiff must be brought as derivative claims in the name of the corporation rather than by the Dickinson individually." The

trial court also dismissed her claim for fraud for failing to state the elements of fraud with particularity.

"A motion to dismiss for failure to state a claim upon which relief may be granted is the proper means to test the legal sufficiency of a pleading." *Kane Plaza Associates v. Chadwick*, 126 N.C. App. 661, 664, 486 S.E.2d 465,467 (1997). In order to survive a motion to dismiss under Rule 12(b)(6), a plaintiff must only state enough to give the substantive elements of a legally recognized claim." *Booker v. Frue*, 86 N.C. App. 390, 392, 358 S.E.2d 127, 128 (1987), *affirmed*, 321 N.C. 590, 364 S.E.2d 141 (1988). "In reviewing the action of the trial court, we are to liberally construe the complaint and determine, whether, as a matter of law, the allegations of the complaint, taken as true, are sufficient to state some legally recognized claim or claims upon which relief may be granted to [plaintiff]." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 394, 537 S.E.2d 248, 252 (2000), *review denied*, __ N.C. __, 547 S.E.2d 13 (2001).

In this appeal, Dickinson first argues that trial court erred in dismissing her claims under Rule 12 (b) (6) of the North Carolina Rules of Civil Procedure on the grounds that they were brought as individual claims and not as derivative claims in the name of the corporation. We agree.

In *Norman, supra*, we held that minority shareholders of a closely held corporation could bring individual actions against majority shareholders. The plaintiffs in that case alleged both individual and derivative claims for constructive trust, breach of

fiduciary duty, conversion, civil conspiracy, unfair and deceptive trade practices, and *quantum meruit*. In reversing the trial court's dismissal under Rule 12(b)(6) of the plaintiffs' action, we held in *Norman* that "minority shareholders in a closely held corporation who allege wrongful conduct and corruption against the majority shareholders in the corporation may bring an individual action against those shareholders, in addition to maintaining a derivative action on behalf of the corporation." *Norman*, 140 N.C. App. at 405, 537 S.E.2d at 259. The Court in *Norman* pointed out the rationale for allowing the shareholder to sue individually: First, the recovery for a derivative action goes to the corporation and therefore the disposition of the recovery of a derivative action would be under the control of the wrongdoers, unless the court intervened to direct an individual recovery; and second, if plaintiffs were required to proceed in a derivative action, they would be subject to the complicated procedural requirements of a derivative action. *See id.*; *see also Meiselman v. Meiselman*, 309 N.C. 279, 288, 307 S.E.2d 551, 557 (1983) (citation omitted) ("It is not always easy to distinguish between a right of the corporation and a right belonging to an individual shareholder. '[T]he same wrongful conduct can give rise to both derivative and direct [individual] claims, for which courts have sometimes allowed shareholders to maintain derivative and direct actions simultaneously.'").

Our holding in *Norman* controls the outcome of this case. First, Aesthetics Educational Institute is a closely held

corporation with no publicly traded stock and Dickinson is a minority shareholder. Analogous to *Norman*, any proceeds recovered by Dickinson in a derivative action would go directly to the corporation, which would go directly to defendant Pastor, an alleged wrongdoer. Moreover, it would be difficult for Dickinson to institute a derivative action on behalf of the corporation because according to her complaint, she has been unable to contact defendant Pastor who is the president of Aesthetic Educational Institute. In light of our holding in *Norman*, we conclude that Dickinson has stated a legally recognizable claim of action against defendants.

Next, Dickinson contends that the trial court erred in holding that her fraud claim failed to state with particularity the elements required to constitute fraud under Rule 9(b) of the North Carolina Rules of Civil Procedure. We agree.

To survive a motion to dismiss under Rule 12(b)(6), "a complaint for fraud must allege with particularity all material facts and circumstances constituting the fraud." *Carver v. Roberts*, 78 N.C. App. 511, 513, 337 S.E.2d 126, 127 (1985). The essential elements of factual fraud are: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). "[I]n pleading actual fraud the particularity requirement is met by alleging time, place and content of the fraudulent representation,

identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981). "It is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constituted facts." *Carver v. Roberts*, 78 N.C. App. at 513, 337 S.E.2d at 127 (quoting *Brooks Equip. & Mfg. Co. v. Taylor*, 230 N.C. 680, 686, 55 S.E.2d 311, 315 (1949)).

Applying the foregoing to the allegations set forth in Dickinson's complaint, we find the complaint sufficient to state a claim of fraud. Dickinson alleged that in July of 1999 in Cornelius, North Carolina, Pastor made false representations by telling Dickinson how her investment would be used to help Aesthetic Educational Institute. Dickinson also alleged that when she requested financial information from the First Union National Bank, she noticed that large sums of money had been transferred from Aesthetic Educational Institutes' account to Pastor and Lake Norman Wellness Center. Since Dickinson's complaint for fraud alleged with particularity the required elements of fraud as outlined in *Terry v. Terry, supra*, we reverse the trial court's Rule 12(b)(6) dismissal of her fraud claim.

For the foregoing reasons, we reverse the trial court's order dismissing the complaint and remand this action for further proceedings.

Reversed and remanded.

Judges HUDSON and THOMAS concur.

Report per Rule 30 (e).