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NO. COA10-1426

NORTH CAROLINA COURT OF APPEALS

Filed: 21 June 2011

EDWARD D. SESSIONS, III,
Plaintiff,

v.

Pasquotank County
No. 10 CVS 327

FIVE "C'S," INC., HARLEY V. COLE
and PAMELA C. EADDY,
Defendants.

Appeal by Plaintiff from order entered 20 September 2010 by Judge J. Carlton Cole in Pasquotank County Superior Court. Heard in the Court of Appeals 13 April 2011.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for Plaintiff.

Hornthal, Riley, Ellis & Maland, L.L.P., by L. Phillip Hornthal, III, for Defendants.

STEPHENS, Judge.

Procedural History and Factual Background

On 25 February 2010, Plaintiff Edward D. Sessions, III, filed a complaint in Currituck County Superior Court against

Defendant Five "C's," Inc. ("Five C's")¹, seeking (1) a declaration of his alleged status as a shareholder, (2) to compel payment of dividends and require furnishing of annual statements to shareholders, (3) monetary damages for alleged diversion and misappropriation of corporate opportunities, and breach of fiduciary duty, and (4) dissolution of Five C's. Defendants answered, moving for a change of venue, appointment of an independent panel pursuant to N.C. Gen. Stat. § 55-7-44(f)², and to stay the proceedings. Defendants also denied various factual claims in Plaintiff's complaint, asserting that Plaintiff had never been issued stock shares or worked for Five C's. Defendants sought dismissal of Plaintiff's complaint for, *inter alia*, failure to state a claim, statutes of limitations

¹Plaintiff also named his former stepfather, Harley V. Cole, and his half-sister, Pamela C. Eaddy, as defendants. Both Cole and Eaddy have been directors of Five C's since its incorporation.

²A trial court "shall dismiss a derivative proceeding on motion of the corporation if one of the groups specified in subsection (b) or (f) of this section determines in good faith after conducting a reasonable inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interest of the corporation." N.C. Gen. Stat. § 55-7-44(a) (2009). Pursuant to subsection (f), "[t]he court may appoint a panel of one or more independent persons upon motion of the corporation to make a determination whether the maintenance of the derivative proceeding is in the best interest of the corporation." N.C. Gen. Stat. § 55-7-44(f).

and repose, laches, estoppel, acquiescence, and lack of standing.

By consent order of 26 April 2010, the action was transferred to Pasquotank County Superior Court, and Steven D. Michael was appointed as an independent panel to make a determination of whether maintenance of the derivative aspect of the case would be in the best interest of Five C's. Further court proceedings were stayed pending the proceedings before the independent panel.

After taking testimony and reviewing documents, on 4 August 2010, the independent panel filed a recommendation stating that: Plaintiff lacked standing to maintain a derivative action because he is not a stockholder of Five C's, all claims of Plaintiff were barred by the applicable statutes of limitation, and maintenance of the derivative action would not be in the best interest of Five C's. On the same date, Defendants filed a motion for summary judgment. On 10 August 2010, Plaintiff filed a motion for partial summary judgment. On 27 August 2010, Plaintiff filed a motion to amend his complaint, seeking to delete from his complaint all allegations that stock certificates had been issued to him. At the same time, he filed an affidavit stating that no stock certificates had ever been

issued by Five C's in his name, and that he rested his rights of ownership in the corporation entirely on the fifth article of incorporation.

The trial court heard the various motions on 30 August 2010 and subsequently entered an order on 20 September 2010 denying Plaintiff's motion to amend his complaint and motion for partial summary judgment, and granting Defendants' motion for summary judgment. The trial court also granted Defendants' motion to dismiss the derivative claims (for diversion and misappropriation of corporate opportunities and for breach of fiduciary duty) in Plaintiff's complaint. Plaintiff appeals the trial court's grant of summary judgment to Defendants and denial of Plaintiff's motions for partial summary judgment and to amend. Plaintiff does not appeal from the portion of the trial court's order which allowed Defendants' motion to dismiss the derivative claims.

On appeal, Plaintiff contends that the trial court erred in granting summary judgment to Defendants on grounds that Plaintiff lacked standing as a shareholder and that his claims were barred by the applicable statutes of limitation. Plaintiff also argues that the trial court abused its discretion in denying his motion to amend his complaint.

Plaintiff's Standing

Plaintiff argues that he had standing as a shareholder of Five C's solely because his name is listed in the corporation's articles of incorporation. We disagree.

Summary judgment is proper when

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A trial court's grant of summary judgment receives de novo review on appeal, and evidence is viewed in the light most favorable to the non-moving party.

Sturgill v. Ashe Mem'l Hosp., Inc., 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007) (citations and quotation marks omitted), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

In his original complaint, Plaintiff alleged that he was a shareholder of Five C's based on both the issuance of a stock certificate to him and on his name being listed in article five of Five C's articles of incorporation. Later, Plaintiff filed an affidavit with the independent panel and motion to amend his complaint with the trial court, stating that he no longer believed that a stock certificate had ever been issued in his name, and seeking to rest his claim of standing entirely on the fifth article of incorporation. That article states:

The names and post office addresses of each of the incorporators of this corporation, who are the same persons as the subscriber[s] for capital stock, and the number of shares subscribed for by each, the aggregate of which being the minimum amount of consideration for its shares to be received by the corporation before it shall commence business, are as follows:

<u>NAMES</u>	<u>ADDRESSES</u>	<u>NUMBER OF SHARES</u>
Pam[e]lla Ruth Cole,	P.O. Box 96, Moyock, N.C.	1
Dwight L. Cole,	P.O. Box 96, Moyock, N.C.	1
Sharon A. Beck,	P.O. Box 96, Moyock, N.C.	1
Eddie D. Cole ³ ,	P.O. Box 96, Moyock, N.C.	1
Debra L. Cole,	P.O. Box 96, Moyock, N.C.	1

Plaintiff now acknowledges that no stock certificate was ever issued to him. However, issuance or possession of certificates is not dispositive of one's rights or standing as a stockholder. "Shares may or may not be represented by certificates." *Collier v. Collier*, __ N.C. App. __, __, 693 S.E.2d 250, 252 (2010); see also *Powell Bros. v. McMullan Lumber Co.*, 153 N.C. 52, 55, 68 S.E. 926, 927 (1910) (noting that a "certificate neither constitutes [one's] title nor is necessary

³According to Plaintiff's complaint and testimony, at the time of Five C's incorporation, Plaintiff was known as "Eddie D. Cole," but has since changed his name and is now known as Edward Dale Sessions, III. His change of name is not otherwise explained in the record on appeal.

to it, but only a memorial of it") (internal quotation marks and citations omitted). Instead, a stock certificate "constitutes only *prima facie* evidence of the ownership of that number of shares." *Meisenheimer v. Alexander*, 162 N.C. 227, 235, 78 S.E. 161, 164 (1913).

On the date of Five C's incorporation in 1974, our General Statutes did not contain any specific provisions regarding stock shares issued without certificates. However, in 1989, the General Assembly enacted the North Carolina Business Corporation Act ("the Act"). Section 55-6-26 of the Act contains the following provisions regarding issuance of shares without certificates:

(a) Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may authorize the issue of some or all of the shares of any or all of its classes or series without certificates. The authorization does not affect shares already represented by certificates until they are surrendered to the corporation.

(b) Within a reasonable time after the issue or transfer of shares without certificates, the corporation shall send the shareholder a written statement of the information required on certificates by G.S. 55-6-25(b) and (c), and if applicable, G.S. 55-6-27.

N.C. Gen. Stat. § 55-6-26 (2009). In turn, section 55-6-25(b) provides that the following information must appear on the face

of any stock certificate: "(1) [t]he name of the issuing corporation and that it is organized under the law of North Carolina; (2) [t]he name of the person to whom issued; and (3) [t]he number and class of shares and the designation of the series, if any, the certificate represents." N.C. Gen. Stat. § 55-6-25(b) (2009).

Here, Plaintiff offered no evidence that Five C's ever sent him a written statement of the information required by sections 55-6-25(b) or 55-6-26. In addition, Plaintiff acknowledges that he did not pay any consideration to Five C's for his alleged share of stock nor did he work for the corporation at the time, despite the language of article five of the articles of incorporation ("consideration for its shares to be received by the corporation") and the requirement in the fourth article of incorporation that the "minimum amount of consideration to be received for shares before commencing business is : ONE THOUSAND (\$1,000.00) DOLLARS. Stockholder[s] must be employees of the corporation" Thus, Plaintiff has failed to offer any evidence that Five C's ever issued him shares without a certificate.

Plaintiff appears to argue that his status as a minor precluded his working for the corporation at the time it was

formed. Plaintiff notes that he worked briefly clearing land and operating a bulldozer on the corporation's property years later, and that, as a minor, he could not have undertaken such work. However, in his deposition, Defendant Cole testified that the corporation is engaged in sales and service of mobile homes, a field which would likely have permitted numerous possible forms of employment appropriate for a seventeen-year-old, Plaintiff's age when the corporation was formed. Plaintiff, however, does not allege that he ever sought employment with Five C's. Further, as noted above, even had Plaintiff sought and obtained employment with the corporation, he acknowledges that he never paid the consideration required to receive shares.

Plaintiff also contends that he is a third-party beneficiary of the articles of incorporation because his name is listed in the fifth article of incorporation. Plaintiff cites *Lamica v. Gerdes*, 270 N.C. 85, 91, 153 S.E.2d 814, 818 (1967), for the proposition that

"[a] third party may sue to enforce a valid contract made for his benefit even though he is a stranger to the contract and to the consideration, and it is not necessary that he be the sole beneficiary, provided the contract was entered into for his direct benefit and the benefit to him is not merely incidental to the agreement."

(quoting Strong: N.C. Index, Vol. 1, Contracts, § 14, p. 586). Plaintiff is correct that this State "recognizes the right of a third-party beneficiary to sue for breach of a contract executed for his benefit." *Snyder v. Freeman*, 300 N.C. 204, 220, 266 S.E.2d 593, 603-04 (1980). However, "the determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract. The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts." *Id.* at 220, 266 S.E.2d at 604 (internal quotation marks omitted). Plaintiff does not argue or explain how the articles of incorporation were intended to benefit him directly. We conclude that the articles offered only a contingent, incidental benefit to Plaintiff; namely, the *right to become* a shareholder by paying \$1,000.00 per share and becoming an employee of Five C's. There is no factual dispute on this matter, as Plaintiff failed to do either. Accordingly, Plaintiff's argument is overruled.

Because there were no genuine issues of material fact regarding Plaintiff's status as a shareholder, he lacks standing to pursue any of his claims against Five C's. Having determined that the trial court properly granted summary judgment to

Defendants on this basis, we need not address Plaintiff's argument that the trial court erred in granting summary judgment to Defendants because the applicable statutes of limitation had run on his claims.

Plaintiff's Motion to Amend

Plaintiff next argues that the trial court abused its discretion in denying his motion to amend his complaint.

Under Rule 15(a), after the filing of responsive pleadings, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2009). "The denial of a motion to amend is reviewed for clearly shown abuse of discretion. When an amendment would be futile in light of the propriety of summary judgment on a plaintiff's claim, it is not an abuse of discretion for the trial court to deny the amendment." *North Carolina Council of Churches v. State*, 120 N.C. App. 84, 93, 461 S.E.2d 354, 360 (1995). Here, Plaintiff's proposed amendment (to rest his entire argument for standing as a shareholder on the fifth article of incorporation) would have been futile, because, as discussed above, Defendants were still entitled to summary

judgment even under Plaintiff's amended argument. This argument is overruled, and the order of the trial court is

AFFIRMED.

Judges STEELMAN and HUNTER, ROBERT N., JR., concur.

Report per Rule 30(e).