[Cite as *Viking & Worthington Steel Ents., L.L.C. v. James,* 2011-Ohio-1714.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

VIKING & WORTHINGTON STEEL ENTERPRISE, L.L.C.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-G-2971**
- vs -	:	
PATRICK JAMES, et al.,	:	
Defendant-Appellant,	:	
VWS/WOR, INC., et al.,	:	
Third Party Defendants-Appellees.		

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 09 M 000809.

Judgment: Reversed and Remanded.

David J. Tocco, J. Scott Jamieson, and *Daren S. Garcia*, Vorys, Sater, Seymour and Pease, L.L.P., 52 East Gay Street, P.O. Box 1008, Columbus, OH 43216 (For Appellees).

John R. Chlysta and *Frank G. Mazgaj*, Hanna, Campbell & Powell, L.L.P., 3737 Embassy Parkway, #100, P.O. Box 5521, Akron, OH 44334 (For Appellant).

Jason P. Yanchar, 125 Claridon Road, Chardon, OH 44024 (For Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Patrick James, appeals the Judgment Entry of the Geauga County Court of Common Pleas, dismissing his counterclaims filed against plaintiff-appellee, Viking and Worthington Steel Enterprise, LLC (VWSE), and cross-

claims against third-party defendant-appellee, VCS/WOR, Inc. (VCS). James' counterclaims were dismissed by the court pursuant to Civ.R. 12(B)(6), on the grounds that James failed to state a claim upon which relief could be granted. For the following reasons, we reverse and remand the decision of the trial court.

{¶2} James is the sole owner of Bainbridge Steel, LLC (Bainbridge). Bainbridge owned fifty-one percent of the membership interest in VWSE, a steel pickling company, and was its managing member. Worthington Steel is the owner of VCS. VCS owned forty-nine percent of VWSE. VWSE's affairs are governed by an Operating Agreement, executed by Bainbridge and VCS on July 27, 2003.

{¶3} From 2003 to 2005, Par Industries, LLC (Par), purchased pickling, or steel treating, services from VWSE. Par owed VWSE $1.6 million for these services but did not pay the amount at the time the services were performed. According to James' Answer, Par is a company "jointly owned through an entity owned by James and by Defendant James Schabel."

{¶4} On April 3, 2008, VWSE made a capital call of $800,000. VCS contributed its pro rata share based on its membership interest but Bainbridge did not. Bainbridge's ownership interest was reduced to zero and VWSE began the winding down process.

{¶5} On March 2, 2009, VWSE filed a Complaint in the Franklin County Court of Common Pleas. The Complaint alleged that James and Schabel had executed a Personal Guaranty in December of 2005, agreeing to pay Par's $1.6 million debt to VWSE "in consideration of VWSE's forbearance from pursuing" collection of that debt. Pursuant to the Guaranty, James guaranteed $1.2 million of the debt and Schabel guaranteed $400,000 of the debt.

{¶6} On April 28, 2009, James filed a Motion to Transfer for Improper Venue. On June 26, 2009, the Motion was granted and the case was transferred to the Geauga County Court of Common Pleas.

{¶7} On August 24, 2009, James filed an Answer, Counterclaim and Cross-Claim. James asserted a total of twelve counterclaims and cross-claims against VWSE and VCS. Counts one through five and seven through eight involved injuries alleged to have been suffered by James, including a breach of fiduciary duty, tortious interference, conspiracy to withhold proceeds from James, breach of contract, conversion, and unjust enrichment. In counts nine through twelve, James asserted that he was entitled to a constructive trust to prevent VWSE, VCS, and Worthington from transferring assets, an accounting of profits, punitive damages, and an injunction requiring VWSE to pay James net proceeds of its sales. Count six was a fraud claim related to the Personal Guaranty signed by James and agreeing to pay $1.2 million of Par's debt to VWSE. James alleged that Worthington made promises to James in order to induce James to sign the Guaranty. James alleges that Worthington promised to purchase pickling services from VWSE if James guaranteed Par's debt.

{¶8} On October 19, 2009, VWSE and VCS filed a Motion to Dismiss James' counterclaims and cross-claim pursuant to 12(B)(6). Also on October 19, 2009, VWSE moved for Summary Judgment pursuant to Civ.R. 56(C) on its Complaint.

{¶9} On January 22, 2010, Bainbridge filed a Motion to Intervene pursuant to Civ.R. 24(A) and (B), asserting that it had standing, as well as James, to bring certain counterclaims and cross-claims against VWSE and VCS. On April 21, 2010, the court dismissed Bainbridge's Motion to Intervene, holding that Bainbridge did not have the closely related and protectable interest required to justify intervention.

{¶10} In an April 21, 2010 Judgment Entry, the court dismissed counts one through five and seven through twelve of the counterclaim, stating that "[a]n individual shareholder has no standing to bring an action for injury to his or her corporation except for direct injury to the shareholder," and that James' injuries were not distinct from those of Bainbridge. Regarding count six, the count claiming that James was fraudulently induced to guaranty Par's debt, the court made several findings. It found that evidence of the alleged promises made by Worthington was inadmissible due to the parol evidence rule. It also found that James' reliance on any promises made by Worthington was unreasonable and that Worthington's promises were contradicted by provisions found in VWSE's Operating Agreement.

{¶11} On June 8, 2010, VWSE filed a Motion to Dismiss the present appeal for lack of a final appealable order. On June 10, 2010, the trial court issued a nunc pro tunc Judgment Entry, amending the April 21, 2010 Judgment Entry which is the subject of this appeal. The court amended the April 21 Entry to include the following language: "Pursuant to Civ. R. 54(B), this Court finds that there is no just reason for delay." On July 9, 2010, this court held that it has jurisdiction to review the appeal and overruled VWSE's Motion to Dismiss.

{¶12} James timely appeals and asserts the following assignment of error:

{¶13} "The trial court erred in dismissing Patrick James's counterclaims and third-party claims."

{¶14} As a general rule, "[a] motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 547, 1992-Ohio-73. "In reviewing a judgment involving a Civ.R. 12(B)(6) motion to dismiss, an

appellate court conducts a de novo review of the complaint to determine whether the dismissal was appropriate." *Masek v. Marroulis*, 11th Dist. No. 2007-T-0034, 2007-Ohio-6159, at ¶24, citing *Ferreri v. Plain Dealer Publishing Co.* (2001), 142 Ohio App.3d 629, 639 (citations omitted).

{¶15} In construing the complaint, an appellate court must "limit its inquiry to the material allegations contained in the complaint and accept those allegations and all reasonable inferences as true." *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App.3d 160, 163 (citation omitted). Accepting all factual allegations as true, a complaint should not be dismissed unless it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, at the syllabus. "'[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.'" *Goss v. Kmart Corp.,* 11th Dist. No. 2006-T-0117, 2007-Ohio-3200, at ¶20 (citations omitted).

{¶16} In order for James to establish a fraud claim, he must "set forth sufficient facts demonstrating (1) a representation of fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with utter disregard and recklessness, as to whether it is true or false, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation, (6) and a resulting injury proximately caused by the reliance." *Adlaka v. Valley Elec. Consol., Inc.*, 11th Dist. No. 2007-T-0071, 2008-Ohio-1690, at ¶17, citing *Natl. City Bank v. Slink & Taylor, LLC*, 11th Dist. No. 2002-P-0045, 2003-Ohio-6693, at ¶23. If the facts alleged in James' Answer and Counterclaim, accepted as true, allow some potential for recovery, dismissal by the trial court would be improper.

{¶17} James argues as his first and second issues that the trial court confused several parties' names and this confusion caused the court to err in dismissing James' fraud claim.

{¶18} James' fraud claim alleges that Worthington fraudulently induced James to guaranty Par's debt in exchange for Worthington's promise to purchase pickling services from VWSE. The trial court found that VWSE's Operating Agreement stated that Worthington was not obligated to bring any business to VWSE. Therefore, the trial court held that James' reliance on Worthington's oral representations was unreasonable, because Worthington's statements would have been inconsistent with the Operating Agreement. James argues VCS, not Worthington, was actually the party who signed the Operating Agreement, and, as a result, the court's analysis on this issue was based on an error.

{¶19} VWSE argues that James failed to raise this argument at the trial court level. Additionally, VWSE argues that regardless of whether Worthington was a party to the Operating Agreement, James led the court to believe that Worthington was a party.

{¶20} "[I]ssues not raised in the lower court and not there tried and which are completely inconsistent with and contrary to the theory upon which appellants proceeded below cannot be raised for the first time on review." *Miller v. Wikel Mfg. Co., Inc.* (1989), 46 Ohio St.3d 76, 78-79, citing *Republic Steel Corp.* v. *Bd. of Revision of Cuyahoga Cty.* (1963), 175 Ohio St. 179, at the syllabus. "[A]rguments *** not raised in the court below *** shall not be considered by this court on appeal." *Danadic v. McCloskey*, 11th Dist. No. 2010-T-0032, 2010-Ohio-5660, at ¶43, citing *Warmuth v. Sailors*, 11th Dist. No. 2007-L-198, 2008-Ohio-3065, at ¶36.

{¶21} "Under the invited-error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the court to make." *State ex rel. O'Beirne v. Geauga Cty. Bd. of Elections*, 80 Ohio St.3d 176, 181, 1997-Ohio-348, quoting *State ex rel. Bitter v. Missig*, 72 Ohio St.3d 249, 254, 1995-Ohio-147. "The invited error doctrine is applied when counsel is 'actively responsible' for the error." *Stainfield v. Jefferson Emergency Rescue Dist.*, 11th Dist. No. 2009-A-0044, 2010-Ohio-2282, at ¶28, citing *State v. Campbell*, 90 Ohio St.3d 320, 324, 2000-Ohio-183.

{¶22} Although somewhat unclear, James distinguished between VCS and Worthington in his Counterclaim. The Counterclaim stated that VCS was a party to the Operating Agreement and that VCS was referred to as "Worthington." The counterclaim and the Operating Agreement should have brought the issue of VCS and Worthington being two separate parties to the trial court's attention.

{¶23} James also asserts that the court's finding that Worthington was the party to the Operating Agreement was in plain error and even if he failed to raise the issue at the trial court level, the issue must still be addressed by this court.

{¶24} "The application of a plain error analysis in civil cases is only in the extremely rare case involving exceptional circumstances where error, in which no objection was made, seriously affects the basic fairness, integrity, or public reputation of the judicial process itself." *In re B.D.*, 11th Dist. Nos. 2009-L-003 and 2009-L-007, 2009-Ohio-2299, at ¶75, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, at the syllabus.

{¶25} The trial court plainly erred when finding that the Operating Agreement stated that Worthington did not have a duty to bring business to VWSE. Although the choice to use the word "Worthington" in the Operating Agreement was a source of

confusion, the first page of the Agreement stated that the Agreement was between "VCS/WOR, INC., an Ohio Corporation ("Worthington") and Bainbridge Steel, LLC." The parenthetical refers to VCS/WOR as Worthington, but the term is clearly defined. Additionally, the Operating Agreement was signed by VCS, not by Worthington. The trial court's failure to realize this makes its analysis that Worthington was not required to bring business to VWSE flawed. The court erred in finding that evidence of Worthington's fraudulent promises to James should be excluded because they contradicted the Operating Agreement.

{¶26} James' third issue asserts that the trial court erred in applying the parol evidence rule to exclude evidence that Worthington fraudulently induced James to guaranty Par's debt by making false promises.

{¶27} "The parol evidence rule states that 'absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.'" *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 2000-Ohio-7 (citation omitted). "The parol evidence rule applies *** only to integrated writings." Id. at 28.

{¶28} James argues that the trial court erred by precluding evidence of fraud under the parol evidence rule. James also argues that evidence of additional consideration, aside from the consideration discussed in the Personal Guaranty, should have been admitted by the trial court because the parol evidence rule does not preclude evidence of contract consideration.

{¶29} VWSE asserts that "because the Personal Guaranty clearly and unambiguously states that the exclusive consideration for the Personal Guaranty is

forbearance of collection upon James's debt, the trial court properly precluded James's evidence of contradictory oral representations."

{¶30} "[T]he parol evidence rule does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent inducement." *Galmish*, 90 Ohio St.3d at 28, citing *Drew v. Christopher Constr. Co., Inc*. (1942), 140 Ohio St. 1, at paragraph two of the syllabus. "[I]t was never intended that the parol evidence rule could be used as a shield to prevent the proof of fraud, or that a person could arrange to have an agreement which was obtained by him through fraud exercised upon the other contracting party reduced to writing and formally executed, and thereby deprive the courts of the power to prevent him from reaping the benefits of his deception." Id. (citation omitted).

{¶31} The parol evidence rule may not be avoided "by a fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, the terms of which are directly contradicted by the signed writing." *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, paragraph three of the syllabus. "[A] fraudulent inducement case is not made out simply by alleging that a statement or agreement made prior to the contract is different from that which now appears in the written contract." *Galmish,* 90 Ohio St.3d at 29 (citations omitted).

{¶32} "It has been held that parol or extrinsic evidence *** is admissible on issues that go to the very existence of a contract, such as consideration, mutual mistake, and fraud." *Americare Healthcare Servs. v. Akabuaku*, 10th Dist. No. 10AP-777, 2010-Ohio-5631, at ¶28. "As long as it is not contradictory to the agreement, the parol evidence rule does not prevent showing by extrinsic evidence what the actual consideration was." Id. (citation omitted); *McInnis v. Spin Cycle-Euclid, LLC*, 8th Dist.

No. 91905, 2009-Ohio-2370, at ¶12. "Ohio law has long provided that the parol evidence rule does not exclude oral testimony with respect to proof of consideration on a written instrument." *Trout v. Parker* (1991), 72 Ohio App.3d 720, 725.

{¶33} Worthington's alleged statements, made prior to the execution of the Guaranty, are not contradictory to the terms of the Guaranty. Although the Guaranty states that the promise of VWSE to forebear from suing Par is consideration for James' guaranty, evidence of additional consideration is allowed. James alleges that the promise to forebear from suing was not the only consideration, but instead that there was additional consideration in the alleged promise made by Worthington. Evidence of such a promise is not contradictory consideration but instead additional consideration. We must take James' statements as true, as James' counterclaims were dismissed based on a Civ.R. 12(B) Motion to Dismiss. Taking these statements as true, the trial court erred in dismissing James' counterclaim, based on its finding that that his statements were precluded by the parol evidence rule. The ultimate admissibility of the evidence should be determined by the trial court at a later stage in the proceedings, after development of the facts has occurred through discovery.

{¶34} James argues that the court erred by holding that the Guaranty was a completely integrated agreement and that the parol evidence rule applied. James also argues that parol evidence of Worthington's promises should be allowed to vary the terms of the Operating Agreement because VCS, not Worthington, was the party to the Operating Agreement and because Worthington was not a party to the Guaranty.

{¶35} Based on the foregoing analysis, these issues are moot, as we have already determined that the trial court erred in dismissing James' fraudulent inducement counterclaim.

{¶36} James also asserts that Worthington made oral promises in 2005 and 2008, which should not have been excluded by the parol evidence rule because they were made after the 2003 Operating Agreement and the 2005 Personal Guaranty.

{¶37} However, the court did not state in its Judgment Entry of dismissal that evidence of these statements could not be admitted because of the parol evidence rule. Instead, it excluded these statements because they were contradictory to the terms of the Operating Agreement, which stated that the "Agreement may be amended only by an Amendment in writing signed by all Members."

{¶38} As noted above, the Operating Agreement was between VCS and Bainbridge. Neither Worthington nor James were parties to the Agreement and neither signed the Agreement. Therefore, separate promises made by Worthington to James were not prevented by the Operating Agreement, as the provision requiring a writing only applied to amendments to the Operating Agreement. Worthington's promises to James would not amend the Agreement. Additionally, separate promises made after the 2005 Personal Guaranty are not prevented by the parol evidence rule because they are subsequent, not prior or contemporaneous statements. Therefore, the trial court erred when excluding evidence of promises made by Worthington subsequent to the 2005 Personal Guaranty.

{¶39} Regarding the fraud counterclaim, James finally asserts that the trial court erred in concluding that James' reliance on Worthington's promises was unreasonable because by 2005, James "should have been aware of the level of patronage Worthington would provide to plaintiff."

{¶40} We agree. The determination as to what James "should have been aware of" was a factual decision. In James' pleadings, he asserted that Worthington made

repeated assurances that it would purchase pickling services, even through 2007. When reviewing a judgment involving a Civ.R. 12(B)(6) motion to dismiss, an appellate court must accept allegations and all reasonable inferences found in the complaint or counterclaim as true. *Gawloski*, 96 Ohio App.3d at 163. Accepting James' assertions as true, James was not aware that Worthington would not purchase an increased amount of pickling services. Therefore, the trial court's finding was in error.

{¶41} In his fourth and fifth issues, James argues that counts one through five and seven through twelve of the counterclaim and cross-claim were improperly dismissed by the trial court, based on lack of standing. On this point, James first argues that as the sole member of a limited liability company (LLC), he has standing to assert claims for injury to the company. He also argues that he has standing to bring these claims individually because he did suffer injuries separate and distinct from those suffered by Bainbridge.

{¶42} VWSE argues James does not have standing because the general rule that shareholders cannot sue in their own names for a corporation's injuries applies. VWSE asserts that the alleged injuries to James are "intertwined with or derivative of a harm allegedly suffered by Bainbridge," and therefore is not separate and district from the injury of Bainbridge.

{¶43} "It is well-settled that only a corporation and not its shareholders can complain of an injury sustained by, or a wrong done to, the corporation." *Adair v. Wozniak* (1986), 23 Ohio St.3d 174, 176 (citations omitted). "[A] plaintiff-shareholder does not have an independent cause of action where there is no showing that he has been injured in any capacity other than in common with all other shareholders as a consequence of the wrongful actions of a third party directed

towards the corporation." Id. at 178; *Matheny v. Ohio Bancorp*, 11th Dist. No. 94-T-5022, 1994 Ohio App. LEXIS 6007, at *4.

{¶44} We decline to address the issue of whether sole shareholders in LLCs can sue separately for injuries suffered by the LLC, since we find that James has shown that he has suffered an injury separate and distinct from injuries suffered by Bainbridge.

{¶45} "If the complaining shareholder is injured in a way that is separate and distinct from an injury to the corporation, then the complaining shareholder has a direct action," allowing him to sue individually. *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 107.

{¶46} "Recovery is available, *** when the individual suffered an injury separate and distinct from that suffered by other shareholders, creditors, or guarantors." *Taha v. Engstrand* (C.A.8, 1993) 987 F.2d 505, 507. "[I]t has been held that if the harm suffered is different than that of the corporation and is based upon an independent contractual relationship between the shareholder and the third party, a cause of action can be maintained by that shareholder." *First Natl. Bank of Toledo v. Martenies*, 6th Dist. No. L-88-251, 1989 Ohio App. LEXIS 3736, at *11. See *Hershman's, Inc. v. Sachs-Dolmar Div.* (1993), 89 Ohio App.3d 74, 77 (appellate court agreed with the proposition of law that "courts have allowed personal actions by stockholders who have suffered individual injuries arising from personal loan guarantees to a corporation").

{¶47} James' claims include assertions that he was improperly squeezed out of the business of VWSE, that he was personally refused access to VWSE's records, that he was not given an appropriate share of VWSE's proceeds, and that his interest in VWSE was reduced to zero. Related to these claims, James asserts that VCS,

Worthington, and VWSE were unjustly enriched and that he is entitled to the imposition of a constructive trust, an accounting of the assets, punitive damages, and injunctive relief.

{¶48} Although Bainbridge has only one member, James, if other members had existed, there is an allegation that James would have been injured in a separate capacity, as needed for an independent and individual action. See *Adair*, 23 Ohio St.3d at 178. James did not just suffer injuries based on his ownership of Bainbridge. He asserts that his injuries arose because of the Guaranty that he signed. This Guaranty was unique to him and was made by him in his individual capacity. James suffered personal damage not just because he was the owner of Bainbridge, but because he personally agreed to pay Par's debts.

{¶49} Additionally, James' assertion that Worthington promised to purchase pickling services from VWSE personally benefitted James, as partial owner of VWSE. Such a benefit would allow James to pay back the money he had promised to pay for Par's debt. Squeezing James out of VWSE, disallowing James access to VWSE facilities, reducing his interest to zero, and refusing to allow James to share in the proceeds of the sale of equipment all affected James' ability to personally pay Par's debt. James also contends that Worthington and VCS took these actions to purposely prevent James from paying the debt he guaranteed, exposing him to personal liability. Such assertions must be accepted as true because this appeal arises from a Civ.R. 12(B)(6) Motion to Dismiss. We cannot say that, when accepting all of the factual allegations as true, James did not have standing to bring these counterclaims and cross-claims and seek related remedies including the imposition of a constructive trust, an accounting of the assets, punitive damages, and injunctive relief. The trial court

erred in dismissing James' counts one through five and seven through twelve, based on a lack of standing.

{¶50} Finally, in James' sixth issue, he asserts that the court may have improperly dismissed his claims because the court failed to realize that James made Worthington a party to the proceedings, although James failed to title his pleading a "third-party complaint."

{¶51} This issue is moot, as we have already determined that the trial court erred in dismissing James' counterclaims and cross-claims.

{¶52} The sole assignment of error is with merit.

{¶53} Based on the foregoing, the Judgment Entry of the Geauga County Court of Common Pleas, dismissing James' counterclaims against VWSE and cross-claims against VCS, is reversed and remanded for proceedings consistent with this opinion. Costs to be taxed against appellee.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.