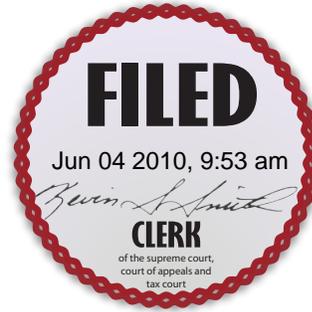


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

GARY A. ZARKOWSKI,)
)
Appellant-Plaintiff,)
)
vs.)
)
DARREN T. SROUFE,)
THE ESTATE OF ERIC D. SPENCER, and)
BADGE BOYZ CUSTOMZ, LLC,)
)
Appellees-Defendants.)

No. 82A04-1001-CC-27

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Mary Margaret Lloyd, Judge
Cause No. 82D03-0904-CC-2133

June 4, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

Case Summary

Gary A. Zarkowski appeals the trial court's dismissal of his complaint and amended complaint against Darren T. Sroufe, the Estate of Eric D. Spencer, and Badge Boyz Customz, LLC (collectively, "Defendants"). We affirm.

Issue

Zarkowski raises one issue, which we restate as whether the trial court properly dismissed his breach of contract claim, which he brought after his ex-wife allegedly assigned her shareholder rights to him.

Facts

Sroufe and Spencer were members of Badge Boyz Customz, LLC ("BBC"). On July 31, 2004, BBC entered into an Asset Purchase Agreement with Pocket Choppers, Inc. ("PCI"), in which BBC agreed to purchase certain assets of PCI and BBC agreed to make certain payments to PCI. Michelle Parker, Zarkowski's ex-wife, was the sole shareholder of PCI, and she signed a covenant not to compete as part of the Asset Purchase Agreement. The Asset Purchase Agreement provided: "Neither party may assign this Agreement without prior written consent of the other party." App. p. 28.

In conjunction with the Asset Purchase Agreement, BBC and PCI entered into a promissory note, in which BBC agreed to pay PCI \$10,000. Sroufe and Spencer signed personal guarantees of the promissory note. The personal guarantees provided that Sroufe and Spencer each "warrant[], covenant[] and agree[] that if any of the Guaranteed Liabilities

are not paid by [BBC] when due . . . Guarantor will promptly make such payment in accordance with the terms therewith” Id. at 66. The Guaranteed Liabilities were defined as “any damages . . . and other amounts payable by [BBC] to PCI, or its holder, successors or assigns, as a result of a breach or violation by [BBC] of any agreement or commitment.” Id. Sroufe also granted PCI a security interest in his vehicle.

In January 2008, Parker and Zarkowski divorced. In September 2008, Parker executed a release and assigned the following to Zarkowski:

all proceeds and benefits to which she might be entitled as a result of litigation now pending or later pending in the case of Parker, et al v. Sroufe, et al, Montcalm County [Michigan] Circuit Court Case No. 01-00-7327-CZ The parties specifically intend that Michelle Parker transfer to Gary Zarkowski all her rights and duties under Paragraph (F)(4) of the property settlement¹ in the Judgment of Divorce in Kent County [Michigan] Circuit Court Case No. 07-06383-DM.

Id. at 98.

In April 2009, Zarkowski filed a complaint against Defendants alleging that they had breached the Asset Purchase Agreement and that interest in this claim was transferred to Zarkowski in the divorce proceedings and subsequent release by Parker. Defendants filed a motion to dismiss arguing that Zarkowski did not have a legal interest in the breach of contract claim. Zarkowski filed a response to the motion to dismiss, a motion to strike, and a motion to amend his complaint. Zarkowski argued, in part, that the motion to dismiss should be treated as a motion for summary judgment because Defendants presented matters outside of the pleadings. The trial court granted the motion to amend Zarkowski’s complaint, and his

amended complaint alleged that Parker assigned her rights, including shareholder rights, to Zarkowski. After a hearing, the trial court granted Defendants' motion to dismiss. Zarkowski now appeals.

Analysis

The issue is whether the trial court properly dismissed Zarkowski's breach of contract claim, which he brought after his ex-wife allegedly assigned her shareholder rights to him.² A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. Babes Showclub, Jaba, Inc. v. Lair, 918 N.E.2d 308, 310 (Ind. 2009). Review of a trial court's grant or denial of a motion based on Trial Rule 12(B)(6) is therefore de novo. Id. When reviewing a motion to dismiss, we view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the nonmovant's favor. Id. A complaint may not be dismissed for failure to state a claim upon which relief can be granted unless it is clear on the face of the complaint that the complaining party is not entitled to relief. Id.

¹ Paragraph (F)(4) of the property settlement agreement is not in the record.

² Zarkowski contends that the motion to dismiss should have been considered a motion for summary judgment as provided by Indiana Trial Rule 12(B) because materials outside the pleadings were presented in Defendants' motion to dismiss. In discussing Rule 12(B), our supreme court recently noted: "If affidavits or other materials are attached to the 12(B)(6) motion, it is treated as one for summary judgment under Rule 56." Thomas v. Blackford County Area Bd. of Zoning Appeals, 907 N.E.2d 988, 990 (Ind. 2009). No affidavits or other materials were attached to Sroufe's motion to dismiss. Although Sroufe mentioned matters in his motion to dismiss that were outside the pleadings, consideration of those matters was unnecessary to rule upon the motion to dismiss, and the trial court granted Sroufe's motion to dismiss. Thus, we use the standard of review applicable to a motion to dismiss. Moreover, even if we consider the motion to dismiss as a motion for summary judgment, the outcome here is the same. Any error in the trial court's procedures was harmless.

Zarkowski argues that he is entitled to bring a direct action against Defendants in his own name rather than a derivative action as a shareholder of PCI because Parker assigned her rights to him and because PCI is a closely held corporation.³ Zarkowski relies upon Barth v. Barth, 659 N.E.2d 559 (Ind. 1995), for the proposition that he is entitled to bring a direct action. However, we conclude that Barth is distinguishable. Even if Parker assigned her shareholder rights to Zarkowski, his claim fails because it was required to be brought as a derivative action rather than a direct action.⁴

The well-established general rule is that shareholders of a corporation cannot maintain actions in their own name to redress an injury to the corporation. Barth, 659 N.E.2d at 560. Our supreme court explained the difference between a direct action and a derivative action in G & N Aircraft, Inc. v. Boehm, 743 N.E.2d 227, 234-35 (Ind. 2001):

A direct action is “[a] lawsuit to enforce a shareholder’s rights against a corporation.” Black’s Law Dictionary 472 (7th ed. 1999). This action may be brought in the name of the shareholder “to redress an injury sustained by, or enforce a duty owed to, the holder.” 2 Principles of Corporate Governance § 7.01, at 17 (A.L.I. 1994). Direct actions are typically appropriate to enforce the right to vote, to compel dividends, to prevent oppression or fraud against minority shareholders, to inspect corporate books, and to compel shareholder meetings.
Id.

³ Zarkowski also argues that, despite the anti-assignability language in the Asset Purchase Agreement, the personal guarantees, security agreements, and the promissory note were assignable. Because we conclude that Zarkowski was not entitled to bring a direct action, we need not address the anti-assignability clause of the Asset Purchase Agreement.

⁴ Defendants also argue that the documents fail to show Parker assigned her shareholder rights to Zarkowski. We need not address this issue because we conclude that, even if Parker assigned her shareholder rights to Zarkowski, the trial court properly dismissed his complaint and amended complaint.

Derivative actions, on the other hand, are suits “asserted by a shareholder on the corporation’s behalf against a third party . . . because of the corporation’s failure to take some action against the third party.” Black’s at 455. They are brought “to redress an injury sustained by, or enforce a duty owed to, a corporation.” A.L.I. at 17. Derivative actions are brought in the name of the corporation and are governed by Trial Rule 23.1 and Indiana Code section 23-1-32-1. To bring a derivative action a shareholder must satisfy four requirements. They are: (1) the complaint must be verified; (2) the plaintiff must have been a shareholder at the time of the transaction of which he complains; (3) the complaint must describe the efforts made by the plaintiff to obtain the requested action from the board of directors; and (4) the plaintiff must fairly and adequately represent the interests of the shareholders. Examples of actions that are typically required to be brought derivatively include actions to recover for loss of a corporate opportunity, to recover corporate waste, and to recover damages to a corporation caused by an officer or director’s self-dealing.

G & N Aircraft, 743 N.E.2d at 234-35. The court held that “a direct action may be brought when . . . it is based upon a primary or personal right belonging to the plaintiff-stockholder.” Id. at 235 (quoting Schreiber v. Butte Copper & Zinc Co., 98 F.Supp. 106, 112 (S.D.N.Y. 1951)). The action is “derivative when the action is based upon a primary right of the corporation but which is asserted on its behalf by the stockholder because of the corporation’s failure, deliberate or otherwise, to act upon the primary right.” Id.

Despite the general rules, the court noted that “[t]he distinction between direct and derivative actions has been complicated in more recent years by recognition in many jurisdictions, including Indiana, of direct actions by shareholders in close corporations for derivative claims.” Id. at 236. Citing Barth, 659 N.E.2d at 562, the court noted that a shareholder in a close corporation is not always required to bring a derivative claim. The

Barth court, following the American Law Institute's Principles of Corporate Governance section 7.01(d), held that a shareholder of a close corporation may proceed against a fellow shareholder in a direct action if that form of action would not: (1) unfairly expose the corporation or the defendants to a multiplicity of actions, (2) materially prejudice the interests of creditors of the corporation, or (3) interfere with a fair distribution of the recovery among all interested persons. Id. (citing Barth, 659 N.E.2d at 562). Both Barth and G&N Aircraft involved actions by one shareholder against another shareholder.⁵

Following Barth and G&N Aircraft, this court decided Hubbard v. Tomlinson, 747 N.E.2d 69 (Ind. Ct. App. 2001). In Hubbard, one shareholder brought an action against another shareholder and a third party. The third party filed a motion for summary judgment, which the trial court denied. On appeal, we held that Barth and G&N Aircraft were distinguishable. Those actions were shareholder actions brought solely against another shareholder, and direct actions were allowed in the context of a close corporation. In Hubbard, the issue was whether a shareholder of a close corporation could sue a third party in a direct action. Hubbard, 747 N.E.2d at 71-72. We concluded that the claims asserted by the shareholder against the third party were derivative claims that must be brought by or on behalf of the corporation. Id. at 72. We noted that allowing the shareholder to proceed with a direct action would disregard the corporation entity, a direct action would fail to protect the corporation from multiple lawsuits, and a direct action would fail to protect creditors of the

⁵ Zarkowski also relies upon W&W Equipment Co. v. Mink, 568 N.E.2d 564 (Ind. Ct. App. 1991), trans. denied, which also involved a claim by one shareholder against another shareholder.

corporation from loss. Id. Consequently, we reversed the trial court's denial of the third party's motion for summary judgment. Id.

Here, Zarkowski has brought a direct action against third parties claiming that the third parties breached their agreements with PCI. We conclude that this action is comparable to that in Hubbard rather than Barth or G&N Aircraft. Consequently, Zarkowski could not bring a direct action against Defendants.

Conclusion

Even if Parker assigned her shareholder claims to Zarkowski, we conclude that Zarkowski could not file this direct action. We affirm the trial court's dismissal of Zarkowski's complaint and amended complaint against Defendants.

Affirmed.

BAILEY, J., and MAY, J., concur.