THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
May 24 2021
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Clifton Newman

C.A. No.: 2015-CP-10-05463

The Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, Jr., ...Appellant,
v.

Richard S.W. Stoney, individually and as Member-manager of The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC, Defendants
and

Theodore Stoney, Jr., individually and as Trustee for Richard Stoney, Jr. and Gregory G. Holmes, Third-Party Intervenors,
of whom

Richard S. W. Stoney, individually and as Member-manager of The Boathouse at Breach Inlet, LLC is .....Respondent.

REPLY BRIEF

HAYNSWORTH SINKLER BOYD, P.A.

Scott Y. Barnes, S.C. Bar No. 528
Stafford J. McQuillin III, S.C. Bar No. 78203
Tyler K. Gilliam, S.C. Bar No. 103170
P.O. Box 340
Charleston, SC 29402
(843) 724-1120

Sarah P. Spruill, S.C. Bar No. 68337
P.O. Box 2048
Greenville, South Carolina 29602-2048
(864) 240-3200
sspruill@hsblawfirm.com
sbarnes@hsblawfirm.com
mmcquillin@hsblawfirm.com
tgilliam@hsblawfirm.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

ARGUMENTS IN REPLY[1]

For the most part, the parties agree on the facts. The primary difference between the two briefs lies with where the focus is placed: Laurence looks to the management of the Company, the Boathouse at Breach Inlet, LLC, and Defendants look to Richard individually and all of his restuarant ventures. Richard, however, is not the Company, and those other ventures were different entities with different members and as such, it was improper for Defendants to use the Company, as a "blood donor" to support Richard's other business ventures and himself personally.

While Richard's strategy for managing his various businesses may have helped support Richard's lifestyle and helped keep some of his other businesses afloat for a while, it did not serve the Company, which Defendants admitted suffered more than $4,000,000 in losses as a result. Defendants have no intention of restoring those funds, even when advised that this practice was improper. A review of the Complaint and Amended Complaint show that this was not an action to recover distributions for Laurence, but was rather an effort to restore Company assets. (R. at 43-59, 151-73). Further, given the circumstances here, Laurence was the only member likely to seek to vindicate the Company's rights.

I. Laurence had standing to bring this action as a class of one.

Rule 23(b)(1), SCRCP provides in part:

> In a derivative action brought by *one* or more shareholders or members *to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it*, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. *The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the*

[1] Terms in this brief have the same meaning as in the Brief of Appellant.

> *shareholders or members similarly situated in enforcing the right of the corporation or association.*

(emphasis added). Pursuant to Rule 43(k), SCRCP, the parties "stipulated that Laurence O. Stoney is not similarly situated to any other member of the Boathouse at Breach Inlet, LLC." (R. at 207-08). Laurence was not similarly situated because he was the only member of the Company that did not benefit from Defendants' improper use of Company funds. As the Complaint and Amended Complaint indicate, the action was not brought to force distributions, but rather to reclaim the monies Defendants had wrongfully taken from the Company. (R. at 43-59, 151-73).

For this reason and for purposes of Rule 23(b)(1), Laurence is only required to fairly and adequately represent his interests in enforcing the Company's rights. The rule makes it clear that one member can assert a derivative action and that a party bringing a derivative action is only tasked with fairly and adequately representing the interests of "members similarly situated." This language provides a procedural device for parties like Laurence, who find themselves in the position of being the only investor in a business entity with an incentive to address harm to that entity, with the ability to bring an action to enforce that entity's rights.

Defendants rely heavily on *Davis v. Comed,* 619 F.2d 588 (6th Cir. 1980), but do not address the Company's arguments that Laurence meets the eight part test set forth in that case. They instead focus entirely on what they characterize as "vindictiveness." Defendants continue to point to incidents involving other restaurants in support of their argument that Laurence does not have standing here as to the Company. The Boathouse on East Bay, LLC is not the Company. Therefore, the pages devoted by Defendants in their brief to the Boathouse on East Bay and any conduct by Laurence relating to the Boathouse on East Bay are simply irrelevant to the issue at hand.

With respect to the testimony Laurence gave in Richard's divorce, there is no evidence that a change in management would have hurt the Company. It might have been harmful to Richard and his ability to "rob Peter to pay Paul," but it was not disloyal to the Company.[2] Nor is there evidence that transferring Richard's interest to Lori as part of the divorce would have been harmful to the Company. Again, it might have been harmful to Richard, but it was not disloyal to the Company.

Seeking to restore the Company's assets by way of this litigation was most certainly not negative conduct toward the company. Again, it may have negatively impacted Defendants, but the object was to protect the Company. Further, a derivative action is the only means of addressing harm to the Company. *Wilson v. Gandis*, 430 S.C. 282, 311, 844 S.E.2d 631, 647 (2020); *Park Regency, LLC v. R & D Dev. of the Carolinas, LLC*, 402 S.C. 401, 411, 741 S.E.2d 528, 533 (Ct. App. 2012).

Defendants do not address any of the cases cited by the Company that treat the rights of minority members of small, closely held companies to bring derivative actions, nor do they address that the trial court's order leaves the Company with no remedy. As noted by the Supreme Court of Texas in a case stemming from the efforts of one investor in a small corporation to bring a derivative action,

> If a wrong has been done, it is the corporation which must be compensated for the wrong. Even if [the party bringing the action] has been harmed by the wrong, he may not recover personally. *Since no direct action by [the party bringing the action] is possible, the lawsuit is either derivative or nonexistent.*

---

[2] In reviewing Richard's divorce action, this Court noted that "[t]hroughout the trial, Husband [Richard] referred to 'robbing Peter to pay Paul' to keep creditors at bay and allow certain businesses to continue operating." *Stoney v. Stoney*, 425 S.C. 47, 58, 70, 819 S.E.2d 201, 207, 214 (Ct. App. 2018) (noting that Breach Inlet was Richard's "only income-producing asset" "which he in turn used for personal expenses or to satisfy other obligations" as well as Richard's "evasive" "antics" and "contemptuous behavior" before the family court).

Eye Site, Inc. v. Blackburn, 796 S.W.2d 160, 161 (Tex. 1990) (citations omitted; emphasis added). In applying the Texas equivalent of Rule 23(b), SCRCP, the *Eye Site* court noted numerous federal court cases and recent trends in reaching the following holding, "[t]he literal terms of [the Rule] and the need to provide a remedy in instances of corporate misconduct convince us that we cannot preclude the sole dissenting shareholder in a close corporation from enforcing the right of the corporation." *Id.* The same logic should apply in this case where it is stipulated that there are no other "similarly situated" members.

The analysis provided by the Virginia Supreme Court in *Cattano v. Bragg*, 727 S.E.2d 625 (Va. 2012) is helpful here. In that case, the minority member of a two-person lawfirm brought a derivative action to recover for harm to the business at the hands of its majority shareholder. The *Cattano* court cited a long list of cases where a class of one successfully sought to maintain a derivative action. *Id.* at 628. The Court then considered the *Davis* factors, noting that these factors are "not exclusive and must be considered in the totality of the circumstances found in each case." *Id.* at 629 (quotation omitted).

The *Cattano* court then made the following ruling:

> While the present case contains economic antagonism as well as apparent animosity between the Firm's only two shareholders, we do not find this to be a determinative factor when evaluating a closely held corporation; nor do we find it determinative that the sole other shareholder does not support the derivative suit. To so hold would be to enact a de facto bar on derivative suits in two-shareholder corporations. Charged emotions and economic antagonism are virtually endemic to disputes in closely held corporations. Nevertheless, a single shareholder derivative claim is still possible, provided that the totality of the circumstances support a finding that the plaintiff's personal interests do not preclude the shareholder from fairly and adequately representing the corporation. In closely held corporations, we must look beyond the mere presence of economic and emotional conflict, placing more emphasis on whether the totality of the circumstances suggest that the plaintiff will vigorously pursue the suit and that the remedy sought is in the interest of the corporation.

Id. The Court ultimately found that the minority shareholder could maintain suit based on the totality of the circumstances and provided the following analysis of the *Davis* factors:

> [T]he "totality of the circumstances" combine to show that Bragg "[f]airly and adequately represent[ed] the interests of the corporation" . . . . The remedy sought—the return of funds, misappropriated by an officer, to the corporation—is highly appropriate for a derivative claim. There is no evidence in the record of external parties motivating Bragg, and she is intimately familiar with the litigation. Bragg's additional individual claims—breach of contract and judicial dissolution—do not reflect an inappropriate conflict of interest. Significantly, as a portion of the funds returned would go to her upon dissolution, Bragg's personal interests are in line with those of the corporation, so that the return of assets to the Firm will clearly be vigorously litigated.

Id.

Similarly, in this case, it should not be disqualifying that Richard and Laurence do not get along. Especially where that disagreement, at least in part, flows from Laurence's efforts to restore Company assets. If that were the case, no minority owner of a closely held business would ever be able to pursue recovery on behalf of the business. The type of conduct at issue here—among other things, taking over $4,000,000 from the Company— will necessarily engender hard feelings on the part of the minority member.

For these reasons, the trial court erred in finding Laurence did not have standing to pursue this action on behalf of the Company.

II. The trial court erred in granting Defendant's request for dissociation.

Defendants have not responded to the argument that the Company can and does function with Laurence as a member. Nor do they respond to the argument that he cannot receive the fair value of his investment unless the Company's assets are restored. Instead, they focus once again on the relationship between Laurence and Richard. That is not the standard. The standard is as set forth in S.C. Code Ann. § 33-44-601(6)(iii), which requires that dissociation is not appropriate unless it is proven that the member in question has "engaged in conduct relating to the company's

business which make it not reasonably practicable to carry on the business with the other member." Here, there is no deadlock, and the Company remains in business with Laurence as a member just as it has since 1997.

Moreover, it was error to award Defendants the affirmative equitable relief of dissociation for two additional reasons: (1) Laurence was not a party to this action in an individual capacity, and (2) the Court did not consider whether Richard had clean hands in seeking this relief. Defendants respond to these arguments solely on error preservation grounds and do not address the merits. These issues, however, were raised to and ruled upon by the trial court. As an initial matter, this case was tried non-jury, so Rule 52, SCRCP is the applicable rule, not Rule 59, SCRCP. Under Rule 52(b), typical directed verdict type arguments may be made after trial. That said, in this case, the arguments in question were made early and often.

As set forth in his appellant's brief, Laurence raised the issue of real party in interest during the trial and again in his post-trial motion. (R. at 489:3-4 ("And yes he is on behalf of the company maintaining this derivative lawsuit."), 1090:18-21 ("[T]here are a lot of cases that say in derivative actions that Laurence Stoney is non-complainant. That the real party at interest here is the company." [3], 258-64). Further, a review of the caption and the Complaint and Amended Complaint, make Laurence's role clear from the time this action was instituted. (R. at 43-59, 151-73). He brought this action on behalf of the Company to address wrongs done to the Company.

With respect to Richard's unclean hands, the issue was raised in the pleadings and at the standing trial. In its preliminary order on standing, the trial court indicated that the evidence tended to show Richard's unclean hands. (R. at 14). Laurence further argued that Richard's conduct

---

[3] The rough version of the transcript reads slightly differently, as follows: "And there are a lot of cases that say in derivative actions that Laurence Stoney is a nominal plaintiff. That the real party in interest here is the company." (R. at 1108).

prevented dissociation at the hearing on the motion to dissociate, stating, "We're talking about equity. The first question is is it equitable for a manager who is accused of looting the company to be able to kick out a minority member as soon as he brings a lawsuit against him?" (R. at 498:2-6, *see also* 491:6-10, 499:7-9). Defendants acknowledged the unclean hands argument in the same hearing on the motion to dissociate as follows: "And to the extent that counsel says that my client comes into the Court with unclean hands what about Laurence's action of going behind Richard's back trying to buy out East Bay from him?" (R. at 492:12-15). Finally, Laurence raised the issue again in his post-trial motion, and the trial court denied the motion with no discussion.

As such, these issues were raised to and ruled on in due course by the trial court.

CONCLUSION

For purposes of standing and dissociation, the inquiry is whether Laurence can represent the interests of the Company and whether the Company can run with Laurence as a member. The inquiry is not whether Laurence and Richard get along or whether Laurence might have interfered with Richard's other businesses in the past. Richard admitted the Company has been successful with Laurence as a member, and he further admitted that success was expected to continue.

For all of these reasons, the trial court erred in finding that Laurence did not have standing to bring this action on behalf of the Company and in ordering the equitable relief of dissociation. This Court should reverse and remand for a determination on the merits based on the existing record in this case.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/ Sarah P. Spruill
Scott Y. Barnes, S.C. Bar No. 528
Stafford J. McQuillin III, S.C. Bar No. 78203
Tyler K. Gilliam, S.C. Bar No. 103170
P.O. Box 340
Charleston, SC 29402
(843) 724-1120

Sarah P. Spruill, S.C. Bar No. 68337
P.O. Box 2048
Greenville, South Carolina 29602-2048
(864) 240-3200
sspruill@hsblawfirm.com
sbarnes@hsblawfirm.com
mmcquillin@hsblawfirm.com
tgilliam@hsblawfirm.com
Attorneys for Appellant

May 24, 2021