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Nov 15 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2018-002009
Case No. 2015-CP-26-05573

K.A. Diehl and Associates, Inc.,

Respondent,

v.

James Perkins, Colleen Franke a/k/a Colleen Franke Perkins,
Mark Dos Santos, William Moore, Steven Dame
and Errol Dos Santos,

Defendants,

Of whom Mark Dos Santos is the

Appellant.

MOTION TO DISMISS THE APPEAL AND COUNTERCLAIMS

Respondent K.A. Diehl and Associates, Inc. (hereinafter “K.A. Diehl”) moves to dismiss the counterclaims of Appellant Mark Dos Santos (hereinafter “Appellant”) and the Notice of Appeal dated November 8, 2018. The ground for this motion is that Appellant now lacks standing to bring the claims asserted.

PROCEDURAL HISTORY

This case began when K.A. Diehl initiated a law suit against Appellant and others for claims of defamation, tortious interference with contractual relations, intentional interference

with prospective contractual relations, civil conspiracy, and injunctive relief. At the time, K.A. Diehl was the association management company for Myrtle Beach Resort Homeowners Association, Inc. (“MBR Association”) and Ocean Front Spa Horizontal Property Regime, Inc. (“OFS Association”) (collectively hereinafter “Associations”), and Appellant and his co-defendants were members of the Associations. In their responsive pleadings, they denied the allegations of wrongdoing and asserted counterclaims for abuse of process, unfair trade practices, civil conspiracy, breach of a fiduciary duty, negligence, and fraud. Eventually, the circuit court dismissed one of Appellant’s counterclaims and Appellant and his co-defendants agreed to a stipulation of dismissal as to three others, leaving claims of civil conspiracy and violation of the South Carolina Unfair Trade Practices Act (SCUTPA).

Appellant and his co-defendants also initiated four separate lawsuits in relation to the underlying facts of this case, including class actions against the Associations and two actions against the two Associations and K.A. Diehl, asserting similar claims to the counterclaims in this matter in a derivative capacity (collectively hereinafter “Derivative Actions”). This action and the Derivative Actions were mediated together. Following mediation, the cases settled with all parties involved (“Settlement”). However, following the Settlement, Appellant alone objected that the agreements reached were not enforceable under Rule 43(k), SCRCP. The trial court enforced the terms of the Settlement, and this appeal and the appeal of the Derivative Actions followed.

On May 11, 2021, Kenneth Moss, President of the MBR Association, filed an affidavit (Exhibit A) with this Court stating Appellant sold his property interest connected to the Regime on March 16, 2021, thereby losing his membership in the Associations. Appellant voluntarily

dismissed the appeal in the Derivative Actions, and an order was entered on June 24, 2021. However, to date, he has refused to dismiss this appeal.

ARGUMENT

The appeal should be dismissed because, even if successful in his challenge as to the enforceability of the settlement agreement, Appellant no longer has standing to bring either of his remaining claims: Appellant is not an owner in Ocean Front Spa Horizontal Property Regime or Myrtle Beach Resort (collectively hereinafter “Regime”) or a member of the Associations, and therefore cannot allege civil conspiracy; and the claim of a violation of SCUTPA is the Associations’ claims, not Appellant’s. Pursuant to Rule 201(b), SCACR, only an “aggrieved party” may appeal. A party is aggrieved when a decision “operates on his or her rights of property or bears directly on his or her interest.” *Beaufort Realty Co., Inc. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 298, 589 (Ct. App. 2001) (citing *Cisson v. McWhorter*, 255 S.C. 174, 178, 117 S.E.2d 603, 605 (1970)). *See, e.g., Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) (holding a party that had “no interest in the subject matter” of the apportionment of funds lacked standing and was therefore not an aggrieved party under Rule 201, SCACR). *See also Furman Univ. v. Livingston*, 244 S.C. 200, 204, 136 S.E.2d 254, 256 (1964) (“It is fundamental that one without interest in the subject matter of a law suit has no legal standing to prosecute it.”). “[A]lthough a party may have an interest giving him a right of appeal, if that interest is divested pending the appeal, the appeal will be dismissed.” *Johnson v. Brandon Corp.*, 221 S.C. 160, 164, 69 S.E.2d 594, 595 (1952) (citation omitted). In this case, Appellant’s interest has been divested during this appeal because

he sold his only property interest connected to the Regime and is no longer a member of the OFS Association or the MBR Association. *See* Ex. A, ¶ 6.¹

I. Appellant no longer has standing to allege civil conspiracy because he sold his sole property interest in the Regime during the pendency of this appeal and is no longer a member of the Associations.

The threshold requirement of standing is “perhaps the most important condition of justiciability.” *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 203 F.3d 149, 153 (4th Cir. 2000) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Requiring a claimant to establish standing ensures that the claimant “has a personal stake in the dispute to render judicial resolution appropriate.” *Friends of the Earth, Inc.*, 203 F.3d at 153.

The irreducible constitutional minimum of standing contains three elements:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly trace[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

¹ This appeal may also be considered moot because, regardless of the judgment rendered by this Court, a ruling on this appeal will have no practical legal effect given that Appellant no longer has standing to request documents and other information from the Associations. *See Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006) (“A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. If there is no actual controversy, [the appellate court] will not decide moot or academic questions.”) (citations omitted). *See also Croft v. Town of Summerville*, 433 S.C. 473, —, 860 S.E.2d 352, 356-57 (2021) (holding residents’ and public interest groups’ claim that an architectural review board’s approval of a construction project violated ordinances was moot because the developer had abandoned the project); *Johnson*, 221 S.C. at 164, 69 S.E.2d at 595 (“If, as we have held, plaintiff no longer has the capacity to continue this action, the question as to her right to a pre-trial examination of [defendant corporation’s president] becomes academic and moot.”).

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted). The Supreme Court defined “particularized” invasion of a legally protected right to “mean that the injury must affect the plaintiff in a personal and individual way.” *Id.* n.1. The South Carolina Supreme Court has further held that “[t]o have standing, a party must have a personal stake in the subject matter of a lawsuit.” *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994).

Appellant alleged civil conspiracy between K.A. Diehl and the boards of directors to “prevent the defendants from gaining records of the [OFS Association] and [the MBR Association], including financial records.” (Defs.’ Answer ¶ 241.) Appellant further alleged the boards and K.A. Diehl “conspired to injure and harm defendants by ... depriving defendants of information.” (Defs.’ Answer ¶ 247.) However, Appellant no longer owns a unit in the Regime, is no longer a member of the Associations, and ultimately does not have a personal stake in the financial records or other information of the Associations. Therefore, even if successful on the theory of his claim, he cannot request documents or records related to property he no longer owns. As a result, this Court should dismiss the Appellant’s claim for civil conspiracy and the appeal in this action.

II. Appellant lacks standing to bring a violation of SCUTPA because his claim belongs to the Associations.

Under South Carolina law, Appellant lacks standing to assert the SCUTPA claim as pled against K.A. Diehl because Appellant seeks the damages of the MBR Association and the OFS Association for an increased cost of insurance. The allegation is that K.A. Diehl caused the Associations’ insurance costs to be unfairly inflated by failing to procure competitive bids, which further caused Appellant’s assessments to increase. South Carolina law is clear that members of a non-profit corporation, like shareholders of a for-profit corporation, cannot

recover damages based on losses suffered by the corporation, like the increase costs insurance in this case.

In South Carolina, “[t]he well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of the stock.” *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 307-08, 728 S.E.2d 61, 65 (Ct. App. 2012) (citing *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (N.C. 1997)). *See also Johnson v. Baldwin*, 221 S.C. 141, 149, 69 S.E.2d 585, 588 (1952) (“The liability of directors for loss to a corporation due to their mismanagement is an asset of the corporation and any recovery on such a cause of action belongs solely to the corporation. The stockholder in an action of this kind is only a nominal plaintiff, the corporation being the real party in terest [sic].”); *Brown v. Stewart*, 348 S.C. 33, 51, 557 S.E.2d 676, 685 (Ct. App. 2001) (holding individuals may not sue corporate directors and officers for losses suffered by the corporation).

In other words, shareholders do not have standing to pursue actions against third parties for the injuries to the corporation, even if their stock value decreases, because they have not suffered an injury caused by those third parties. “A shareholder may maintain an individual action [against the alleged wrongdoers] only if his loss is separate and distinct from that of the corporation” and “if alleged wrongdoers owe a fiduciary relationship to the stockholders and full relief to the stockholder cannot be had through a recovery by the corporation.” *Brown*, 348 S.C. at 49, 557 S.E.2d at 684. *See also Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988) (“If...the misconduct [by the management of a corporation] has caused a loss to the corporation, and not to any particular stockholder, the liability is an asset of the corporation, ordinarily remediable by a suit in the name of the corporation.”).

Here, Appellant does not have standing to bring a claim against K.A. Diehl for the Associations' increased operating expenses. The violation of SCUTPA claim does not allege any losses suffered that are separate and distinct from the MBR Association's and the OFS Association's damages. Instead, Appellant asserted that K.A. Diehl's failure to procure competitive bids was a breach of K.A. Diehl's agreements with the Associations and that such a breach caused the Associations to incur higher operating expenses. Further, the higher operating expenses caused Appellant's assessments to increase. The only individual damages asserted by Appellant include an increase in his annual assessments, which, like a diminution in a shareholder's stock in a corporation, cannot be sought from K.A. Diehl in this case. The increase in assessments is not an "injury" caused by K.A. Diehl that gives rise to a cognizable action.²

Moreover, similar to the relief sought in *Brown*, Appellant's full relief was recovered by the Associations in the Derivative Actions that reached settlement. 348 S.C. at 49, 557 S.E.2d at 684. Appellant sought damages against K.A. Diehl for violation of SCUTPA. To allow him to recover damages on behalf of the Associations—to which he no longer belongs—for increased insurance costs in the Derivative Actions *and* individually for increased assessments in this action would allow for double recovery. *See Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990) ("It is a fundamental rule of law in this state that there can be no double recovery for a single wrong.") (citation omitted). Because

² Additionally, even assuming *arguendo* that Appellant initially had standing to bring this claim against K.A. Diehl, Appellant lost that standing when he sold his property associated with the Associations and the Regime. *Cf. Johnson*, 221 S.C. at 149-50, 69 S.E.2d at 589 ("The right of a stockholder to maintain a derivative action against the directors of a corporation 'inheres in and attaches to his ownership of its stock and does not exist apart from such ownership.' It is a right which depends on status. If there is a loss of status, the action abates so far as the stockholder bringing the action is concerned, although the cause of action itself survives.") (citations omitted).

Appellant was able to obtain the full relief sought through his Derivative Actions, his claim for individual damages in connection with increased insurance costs must be dismissed. Accordingly, Appellant lacks standing to bring his cause of action for violation of SCUTPA.

CONCLUSION

Given that Appellant Mark Dos Santos sold his only property interest connected to the Regime and the Associations, and because Appellant cannot bring a violation of SCUTPA claim individually based on the facts asserted in the underlying action, this Court should grant Respondent's motion to dismiss the counterclaims and the appeal for lack of standing.

BURR & FORMAN LLP

s/Alicia E. Thompson

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PROOF OF SERVICE

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Attorneys for the Respondent

I, Alicia E. Thompson, of Burr & Forman LLP, attorney for the Respondent, hereby certify that the foregoing **MOTION TO DISMISS THE APPEAL AND COUNTERCLAIMS** was served on Appellant on November 15, 2021, via email (see attached), to counsel of Record for Appellant:

Russell G. Hines, Esquire
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Respectfully submitted,

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Myrtle Beach, South Carolina

November 15, 2021

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VIA EMAIL: ctappfilings@sccourts.org

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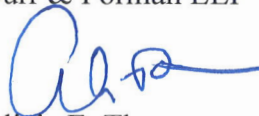
Re: K.A. Diehl and Associates, Inc. v. James Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Danne, and Errol Dos Santos, of Whom Mark Dos Santos is the Appellant
Appellate Case No. 2018-002009
Case No. 2015-CP-26-05573
Our Client Matter No. 2063741.0000002

Dear Ms. Kitchings:

Please find attached for filing Respondent's Motion to Dismiss the Appeal and Counterclaims and Proof of Service, with regard to the above referenced appeal. This Motion is being filed via electronic mail, and the filing fee of \$50.00 is being placed in the mail. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Burr & Forman LLP



Alicia E. Thompson

AET/se
Attachments

Jenny Abbott Kitchings, Clerk of Court
November 15, 2021
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cc: Client (*via email only*)
Russell G. Hines, Esquire (*via email only*)
D. Jay Davis, Jr., Esquire (*via email only*)

Evans, Sheila

From: Evans, Sheila
Sent: Monday, November 15, 2021 10:59 AM
To: 'Hines, Russell'
Cc: 'jdavis@ycrlaw.com'; 'pbell@ycrlaw.com'; Golding, Henrietta; Voegel, Taylor; Thompson, Alicia
Subject: K.A. Diehl v. Perkins; Appellate Case No. 2018-002009/2063741.0000002
Attachments: Respondent's Motion to Dismiss Appeal.pdf

Good Morning Mr. Hines,

Attached please find the following documents:

1. Copy of letter to the Court of Appeals of today's date.
2. Motion to the Dismiss Appeal and Counterclaims.
3. Proof of Service.

Sheila