

2017 IL App (1st) 162097-U
No. 1-16-2097
Order filed September 29, 2017

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ARTHUR CHMIEL,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant)	Cook County
)	
v.)	No. 15 CH 12562
)	
DENNIS STABILE, ROSEMONT NO. 1, INC,)	
and STABILE ENTERPRISES, INC.,)	Honorable
)	Anna Helen Demacopoulos,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the judgment of the circuit court finding that plaintiff was not entitled to distributions as a result of his stock ownership. We reverse, however, the circuit court's judgment that plaintiff lacked standing to bring a derivative action and that his declaratory judgment claims were moot, and remand for further proceedings.

¶ 2 Plaintiff, Arthur Chmiel, filed a complaint for a shareholder derivative claim and declaratory judgment on behalf of Rosemont No. 1, Inc. (Rosemont) and Stabile Enterprises, Inc. (Bensenville) against Dennis Stabile. In his 10-count complaint, Plaintiff contended that he was a

former employee and minority shareholder of two franchised McDonald's restaurants, Rosemont and Bensenville, owned and operated by Stabile. Plaintiff asserted that he brought this action to "remedy and recover damages sustained as a result of reckless and egregious acts of breaches of fiduciary duty and corporate waste" by Stabile, the sole director of Rosemont and Bensenville. The circuit court found that plaintiff lacked standing to bring a shareholder derivative claim because defendants had tendered payment for his shares pursuant to the buyback provision in the shareholder agreements after he voluntarily terminated his employment. The circuit court further found that his claims regarding the valuation of his shares were moot where his shares were already valued in accordance with the respective shareholder agreements and defendants had tendered payment for his shares. The court also found that plaintiff was not entitled to corporate distributions where the shareholder agreements did not provide for such distributions.

¶ 3 On appeal, plaintiff contends that the circuit court erred in finding that he lacked standing to bring a shareholder derivative claim where he did not accept the payment tendered to buy back his shares because he was challenging the valuation of his shares based on Stabile's fraudulent activities. He further contends that the court erred in finding his declaratory judgment claims moot where he presented evidence of inaccuracies in the valuation of his shares. Plaintiff also asserts that the circuit court's finding that he was not entitled to distributions was against the manifest weight of the evidence. Plaintiff finally contends that the court erred in denying his motion for reconsideration. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

¶ 4

I. BACKGROUND

¶ 5 Plaintiff filed a 10-count complaint for a shareholder derivative action on behalf of Rosemont and Bensenville against Stabile. In his complaint, he contended that Stabile was the

sole director of both Bensenville and Rosemont and Stabile Management Company, Inc. (Stabile Management) and plaintiff was an employee. On September 23, 1993, plaintiff and Stabile entered into a “Restated and Amended Shareholders Agreement,” (Rosemont Shareholder Agreement) which provided plaintiff with a 10% ownership interest in Rosemont and set forth the terms of their agreement. Plaintiff attached a copy of the Rosemont Shareholder Agreement to his complaint. The agreement provided, in pertinent part, that upon the occurrence of a triggering event, such as the minority shareholder’s termination of employment, the corporation shall purchase the shares of the affected shareholder within 30 days at a value determined by a valuation formula in the agreement (Net Sale Price).

¶ 6 On April 1, 1998, plaintiff and Stabile entered into a “Buy/Sell Agreement,” (Bensenville Buy/Sell Agreement) which granted him a 10% ownership interest in Bensenville.¹ The Bensenville agreement provided for a buyback provision similar to the one contained in the Rosemont Shareholder Agreement, but included a different valuation formula. The Bensenville Buy/Sell Agreement provides that shares will be repurchased at “Book Value,” which is defined as “the value of the shares of the Corporation determined by the Corporation’s certified public accountant” and further provided that “such determination will be binding and conclusive on the parties hereto.”

¶ 7 Plaintiff voluntarily terminated his employment with Rosemont on March 15, 2014, triggering the stock buyback provisions in each agreement. Plaintiff contended that at the time the share valuation was performed pursuant to the terms set forth in each shareholder agreement,

¹ Plaintiff did not attach a copy of the Bensenville Buy/Sell Agreement to his complaint. Defendants attached a copy of the agreement to their motion to dismiss, but, on appeal, plaintiff contends that the agreement is “in dispute.” Plaintiff asserts that he believes there is an alternate document he intends to pursue in discovery, but for purposes of this appeal, plaintiff bases his arguments on the version of the agreement attached to defendants’ motion to dismiss.

he learned that the valuations were based on records of corporate assets that had been fraudulently depleted by Stabile. Plaintiff asserted that Stabile, in his capacity as majority shareholder, stripped benefits from Rosemont and Bensenville in order to benefit Stabile Management and to pay his personal expenses, which diminished distributions to plaintiff. Plaintiff contended that based on discrepancies between defendants' tax returns and profit and loss statements, he believed that the earnings of Rosemont and Bensenville had been understated by approximately \$1.1 million during his time as a shareholder.

¶ 8 Plaintiff's derivative action is contained in Counts I-IV of the complaint and states causes of action for waste of corporate assets and breach of fiduciary duty with respect to the Rosemont and Bensenville restaurants. Plaintiff contended that Stabile used funds from Rosemont and Bensenville to pay "excessive management fees" to Stabile Management and to pay his personal expenses. In Counts V and VI, plaintiff sought a declaratory judgment of the valuation of his shares and to compel defendants to purchase his shares in accordance with the formulas outlined in the agreements based on an accurate assessment of defendants' corporate assets determined in light of his derivative claims. In Counts VII-X, plaintiff contended that under the terms of the agreements, Rosemont and Bensenville had failed to make certain distributions to him as a shareholder. Plaintiff sought a declaratory judgment as to the amount of distributions owed and to compel payment of the distributions.

¶ 9 Defendants filed a motion to dismiss plaintiff's complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)). In their motion, defendants asserted that they paid plaintiff the full value of his shares—\$338,819—but plaintiff "want[ed] more." Defendants asserted that after plaintiff voluntarily terminated his employment, the company's accountant calculated the Net Sale Price and the Book Value of plaintiff's shares

in the respective restaurants and Stabile presented him with a check for \$330,000 to purchase his shares in Rosemont and Bensenville pursuant to the shareholder agreements. After plaintiff rejected that offer, Stabile contacted another certified public accountant who calculated the sum of plaintiff's shares to be \$338,819. After plaintiff filed his complaint, defendants tendered plaintiff two checks in court totaling \$338,819, and the money was held in escrow "with no prejudice to plaintiff's position going to the acceptance of the tendered payment, the correctness of the amounts tendered or otherwise."

¶ 10 Defendants contended that Counts V and VI of plaintiff's complaint were therefore moot because defendants had tendered payment to plaintiff for the total amounts he was due under the shareholder agreements. Defendants further asserted that plaintiff lacked standing to bring a derivative action in Counts I-IV because he had voluntarily terminated his employment, and defendants had tendered him payment for his shares pursuant to the terms of the shareholder agreements. Defendants contended that plaintiff was, therefore, no longer a shareholder of Rosemont and Bensenville. Defendants finally maintained that the court should dismiss Counts VII-X of plaintiff's complaint because plaintiff was not entitled to any distributions where the shareholder agreements did not provide for any distributions.

¶ 11 In ruling on defendants' motion, the court found that plaintiff's claims regarding the valuation of his shares in Counts V and VI were moot because defendants had tendered payment to plaintiff after determining the value of his shares in accordance with the shareholder agreements. The court noted that if it were to accept plaintiff's argument regarding valuation:

"[S]omeone could voluntarily terminate themselves from employment, as we have in this case here, and decide, [y]ou know what, I'm just not going to accept that check. I'm going to wait for the value of the stock to go up. Hold the rest of the company

hostage because I'm going to hold on to my shares, and when I decide to buy it back or to get paid, then I will.”

The court determined that plaintiff's position would undermine the purpose of the buyback provisions, which were put into the agreements so that once the employment ends, so does the employee's interest. At that time, it is the obligation of the corporation to buy back the shares, and the obligation of the employee to sell. The court found that defendants had performed in accordance with the buyback provision by tendering payment, but plaintiff had not performed by selling his shares. The court therefore determined that plaintiff's claims regarding the valuation of his shares were moot.

¶ 12 With regard to Counts I-IV of plaintiff's complaint, the shareholder derivative action, the court found that plaintiff's employment had been terminated, defendants had tendered payment, and therefore plaintiff was no longer a shareholder and had lost standing to pursue a derivative action. The court noted that there was no evidence that plaintiff raised any claims regarding breach of fiduciary duty or waste of corporate assets at the time he was a shareholder and had a right to raise such claims in a derivative action. Accordingly, the court dismissed Counts I-IV for lack of standing.

¶ 13 As to Counts VII-X, the court observed that the Business Corporation Act of 1983 (BCA) (805 ILCS 5/9.10(a) (West 2010)) states that the board of directors of a corporation may authorize the corporation to make distributions to its shareholders. The court noted that such distributions are up to the discretion of the board of directors. The court further noted that despite plaintiff's claims to the contrary, neither the Rosemont Shareholder Agreement nor the Bensenville Buy/Sell Agreement provided for any distributions. The court therefore dismissed

Counts VII-X pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)) with prejudice and granted defendants' motion to dismiss the complaint.

¶ 14 Plaintiff filed a motion to reconsider the circuit court's judgment contending that he could not be divested of shareholder status where he was contesting the valuation of his shares and became aware of Stabile's fraudulent activity only after the buyback provisions were effectuated. Plaintiff asserted that it would be against public policy to require him to sell his shares based on a valuation that had been calculated using fraudulently diminished corporate assets. The circuit court denied plaintiff's motion finding that "plaintiff has failed to state an adequate basis for the Court to reconsider its ruling ***." This appeal follows.

¶ 15

II. ANALYSIS

¶ 16 On appeal, plaintiff contends that the circuit court erred in finding that he was no longer a shareholder at the time he terminated his employment and defendants tendered payment for his shares where he was disputing the valuation of his shares. He further contends that the circuit court erred in dismissing his share valuation claims where he was disputing the valuation of his shares and there was evidence of inaccuracies in the valuation. Plaintiff also asserts that the court erred in finding that he was not entitled to distributions and that the court erred in denying his motion to reconsider.

¶ 17

A. Standard of Review

¶ 18 Defendants brought their motion to dismiss plaintiff's complaint pursuant to section 2-619 of the Code (735 ILCS 2-619 (West 2014)). A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the complaint, but asserts affirmative matters outside of the complaint. *Hoover v. Country Mut. Ins. Co.*, 2012 IL App (1st) 110939, ¶ 31. When ruling on a section 2-619 motion to dismiss, the court must view all pleadings in a light most favorable to

the non-moving party (*Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8), and accept as true all well-pleaded facts (*Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31). We review the dismissal of a cause of action pursuant to section 2-619 of the Code *de novo*. *Hoover*, 2012 IL App (1st) 110939, ¶ 31.

¶ 19 B. Plaintiff's Derivative Action

¶ 20 We first address whether the circuit court correctly found that plaintiff lacked standing to bring a derivative action where plaintiff had voluntarily terminated his employment and defendants had tendered payment for his shares in accordance with the shareholder agreements. Plaintiff contends that the valuation of his shares cannot be accomplished without the resolution of his derivative claim and that the circuit court erred in finding that a party loses standing as a shareholder to pursue derivative claims at the time payment is tendered even where the valuation of the shares is in dispute.

¶ 21 “A derivative action is an action that a corporate shareholder brings on behalf of a corporation to seek relief for injuries done to that corporation, where the corporation either cannot or will not assert its own rights.” *Davis v. Dyson*, 387 Ill. App. 3d 676, 682 (2008) (citing *Caparos v. Morton*, 364 Ill. App. 3d 159, 167 (2006)). In Illinois, to bring a derivative claim, the plaintiff must have been a shareholder at the time of the transaction of which he complains and must maintain his status as a shareholder throughout the entire pendency of the action. *Stevens v. McGuireWoods LLP*, 2015 IL 118652, ¶ 23.

¶ 22 According to the terms of the respective shareholder agreements, within 30 days of the termination of plaintiff's employment, defendants were required to value and subsequently repurchase plaintiff's shares according to formulas outlined in those agreements. Here, plaintiff terminated his employment on March 15, 2014, triggering the stock buyback provisions in each

agreement. Plaintiff contended that after he discovered Stabile's fraudulent activities, the parties were unable to agree to the value of his shares and on August 20, 2015, he filed his complaint. On January 18, 2016, defendants tendered two checks to plaintiff representing the value of his shares as calculated by a certified public accountant totaling \$338,819, and the money was held in escrow "with no prejudice to plaintiff's position going to the acceptance of the tendered payment, the correctness of the amounts tendered or otherwise." In their motion to dismiss, filed the next day, defendants contended that they had previously attempted to purchase plaintiff's shares, but he had declined their offers because they had been unable to agree on the proper share valuation. Defendants also contended, as they do before this court, that the tender of payment divests plaintiff of his shareholder status, leaving him without standing to pursue a derivative action.

¶ 23 Although we observe that defendants, in accordance with the shareholder agreements, tendered payment for plaintiff's shares after they were valued in accordance with the formulas contained in those agreements, plaintiff's complaint raises a question as to the propriety of the corporate assets used in those calculations. Plaintiff points to excessive management fees paid from Rosemont and Bensenville to Stabile Management and outlines personal expenses that Stabile paid with funds from Rosemont and Bensenville. Plaintiff contends that after reviewing the financial statements of Rosemont and Bensenville during the period he was a shareholder, he discovered an understatement of more than \$1.1 million. Rather than contest the substance of plaintiff's claims, defendants sought to dismiss plaintiff's derivative action on standing grounds. As plaintiff points out, however, he is entitled to keep his shares, and thus maintain his status as a shareholder, until a proper valuation and tender of payment based on that valuation, is accomplished.

¶ 24 As discussed, defendants complied with the provisions of the shareholder agreements in calculating the valuation of his shares. Plaintiff contends, however, the corporate assets on which those valuations are based were fraudulently diminished. Thus, a proper valuation cannot take place without first disposing of plaintiff's claims. Where there is no proper valuation, the buyback provision cannot be properly effectuated, and plaintiff maintains standing as a shareholder to pursue a derivative action. The situation presented in this case is therefore distinct from the one identified by the circuit court where a shareholder holds the company "hostage" "wait[ing] for the value of the stock to go up." In such a situation, the shareholder is not contesting the valuation of his shares, but rather seeking a windfall based on increased stock prices with no legitimate basis to withhold his shares. That is not the situation in this case where plaintiff is merely seeking the fair value of his shares calculated in consideration of the alleged fraud.

¶ 25 In sum, without a resolution of plaintiff's claims, it cannot be determined whether the valuations performed were based on appropriate corporate financial data. There is nothing in the shareholder agreements which would suggest that plaintiff is required to relinquish his shares regardless of any challenge he may have to the valuation performed other than the provision in the Bensenville Buy/Sell Agreement, which states that the account's calculation of Book Value shall be "binding and conclusive" on the parties. Such provision, however, cannot be read to suggest that plaintiff relinquishes all right to contest the valuation where he raises allegation of fraud and waste of corporate assets.

¶ 26 Although the valuation has been performed, and payment has been tendered, plaintiff has refused to accept this payment based on the alleged fraud. This case is thus unlike *Dolezal v. Plastic & Reconstructive Surgery, S.C.*, cited by defendants, where in that case the issue was the

validity of the employee's termination and there was no dispute regarding the valuation of the shares that would have precluded a proper buyback. *Dolezal v. Plastic & Reconstructive Surgery*, S.C., 266 Ill. App. 3d 1070, 1081-82 (1994). Accordingly, we find that the circuit court erred in dismissing Counts I-IV of plaintiff's complaint finding that he lacked standing to pursue to a derivative action.

¶ 27

C. Declaratory Judgment

¶ 28 Similarly, we find that the court erred in finding Counts V and VI of plaintiff's complaint moot. In Counts V and VI, plaintiff asked that the circuit court determine the rights and liabilities of the parties with respect to his shares in Rosemont and Bensenville and compel defendants to purchase his shares based on a valuation of the shares pursuant to the terms of the shareholder agreements. Defendants contended in their motion, and the circuit court agreed in its holding, that this claim was moot because defendants had tendered payment for plaintiff's shares after calculating the share valuation in accordance with the formulas outlined in the shareholder agreements. As discussed above, however, plaintiff alleged in his complaint that the calculations were based on corporate assets that had been fraudulently diminished by Stabile.

¶ 29 Although the amounts tendered by defendants were calculated consistently with the formulas in the shareholder agreements, such amounts cannot be presumed valid in light of plaintiff's allegations concerning waste of corporate assets and fraud. Plaintiff pointed to discrepancies between defendants' tax returns and profit and loss statements and asserted that Stabile stripped benefits from Rosemont and Bensenville to pay his personal expenses and to improperly benefit Stabile Management. Under these circumstances, defendants' tender of payment for an amount that plaintiff asserts was fraudulently diminished, cannot be the basis for finding plaintiff's claims moot. We find the court erred, therefore, in dismissing plaintiff's

declaratory judgment claims as moot where he alleged that fraud and other factors improperly diminished the value of his shares.

¶ 30

D. Corporate Distributions

¶ 31 Plaintiff next contends that the circuit court erred in dismissing Counts VII-X of his complaint requesting certain distributions from Rosemont and Bensenville. Plaintiff contends that distributions “were routinely shared in practice” and that the BCA provides for the payment of dividends in light of fraudulent conduct of the majority shareholder.

¶ 32 We observe, however, that in his complaint, plaintiff advanced his claims for distributions solely on the basis that the shareholder agreements entitled him to distributions. In his complaint, plaintiff contended that “pursuant to the governing documents pertaining” to Rosemont and Bensenville, the defendants were “obligated to pay Plaintiff distributions in proportion to Plaintiff’s ownership percentage.” On appeal, plaintiff acknowledges that the shareholder agreements do not mandate distributions, and now raises alternate theories to support his claims. We observe, however, that “[i]t is well settled that an unsuccessful party may not advance a new theory of recovery on appeal” (*In re Detention of Anders*, 304 Ill. App. 3d 117, 123 (1999)), and that doing so results in forfeiture of that issue (see, e.g., *1010 Lake Shore Ass’n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶¶ 14-15 (issues not raised in the trial court are forfeited)).

¶ 33 Nonetheless, as the circuit court observed, the BCA provides the board of directors with the discretion to make distributions. 805 ILCS 5/9.10(a) (West 2010) (“The board of directors of a corporation *may* authorize, and the corporation *may* make, distributions to its shareholders ***.”) (Emphasis added). Here, there is no evidence that the board authorized such distributions, and neither the shareholder agreements, nor the BCA mandated that the board make such

distributions. We also find no support for plaintiff's contention that under the BCA, the court may unilaterally require a corporation to make distributions where they are not otherwise authorized or mandated. Thus, in the absence of a distributions authorized by the board of directors, we find that the circuit court did not err in dismissing plaintiff's claims for distributions in Counts VII-X of his complaint.

¶ 34 E. Motion for Reconsideration

¶ 35 Plaintiff also contends that the court erred in dismissing his motion for reconsideration. The purpose of a motion to reconsider is to bring to the court's attention (1) newly discovered evidence not available at the time of the hearing; (2) changes in the law; or (3) errors in the court's previous application of the law. *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1140 (2004). We will not disturb the circuit court's ruling on a motion for reconsideration absent an abuse of discretion. *Id.* Because we find that the court erred in dismissing Counts I-VI of plaintiff's complaint, we also find that the court abused its discretion in dismissing his motion for reconsideration with regard to those counts. We also find, however, that the court properly dismissed plaintiff's motion for reconsideration with regard to his claims for distributions where, as discussed, he was not entitled to receive distributions.

¶ 36 F. Plaintiff's Complaint Not Signed

¶ 37 Finally, defendants contend that we may dismiss plaintiff's complaint solely on the basis that it is not signed. Defendants contend that they brought this matter to plaintiff's attention on three occasions before the circuit court, but plaintiff failed to remedy the omission and sign the complaint. Defendants assert that under Supreme Court Rule 137 (eff. July 1, 2013), plaintiff's complaint must be stricken for failure to comply with the signature requirements. Plaintiff

acknowledges that his complaint is unsigned, but contends that because his complaint was electronically filed, it was deemed signed upon transmission.

¶ 38 Defendants are correct that Rule 137(a) provides that “[e]very pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record in his individual name” and that “[i]f a pleading, motion, or other document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.” Ill. S. Ct. R. 137(a) (eff. July 1, 2013). Defendants are also correct that neither plaintiff nor his attorney signed the signature or verification pages of the complaint even after defendants brought this omission to plaintiff’s attention before the circuit court. We observe, however, that plaintiff’s complaint was filed electronically. Cook County Circuit Court General Administrative Order 2014-02 (eff. Jan. 1, 2013; amended Sept. 16, 2014) addresses the electronic filing of court documents. The administrative order provides that “[i]n the absence of facsimile or typographical signature, any document electronically filed with a user ID and password issued by the Clerk's Office shall be deemed to have been signed by the registered filer to whom the user ID and password are registered.” (Cook Co. Cir. Ct. Gen. Adm. Order 2014-02(10)(c).² Accordingly, we find that plaintiff’s complaint was signed in accordance with the administrative order and should not be dismissed on that basis.

¶ 39

III. CONCLUSION

¶ 40 For the reasons stated, we affirm the circuit court’s dismissal of Counts VII-X, reverse the dismissal of Counts I-VI and remand the cause to the circuit court of Cook County for further proceedings consistent with this order.

² We observe that Cook County Circuit Court General Administrative Order No. 2014-02 was again amended on June 13, 2016; however, the electronic signature provisions were unchanged.

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¶ 41 Affirmed in part, reversed in part. Cause remanded.