IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-518

Filed: 18 October 2016

Wake County, No. 13 CVS 13297

JOHN L. GRASINGER AND LAWRENCE BENUCK, Plaintiffs

v.

JASON A. WILLIAMS AND CAMERON L. PERKINS, Defendants

Appeal by plaintiffs from an order entered 16 January 2015 by Judge Gregory P. McGuire in Wake County Superior Court. Heard in the Court of Appeals 13 January 2016.

Jordan Price Wall Gray Jones & Carlton, by Paul T. Flick and Lori P. Jones, for plaintiff-appellants.

Wyrick Robbins Yates & Ponton, LLP, by Tobias S. Hampson, K. Edward Greene, and Charles George, for defendant-appellees.

CALABRIA, Judge.

John L. Grasinger ("Grasinger") and Lawrence Benuck ("Benuck") (collectively, "plaintiffs") appeal from an order granting Jason A. Williams ("Williams") and Cameron L. Perkins's ("Perkins") (collectively, "defendants") motions to dismiss. Because plaintiffs lacked standing, the trial court correctly

determined that it lacked subject matter jurisdiction over the proceeding. Therefore, we affirm.

I. Background

In early 2009, plaintiffs became interested in establishing a partnership to open and operate an urgent care facility in Boone, North Carolina. Grasinger had experience in real estate development, and Benuck had experience in building and operating urgent care clinics. Subsequently, plaintiffs began negotiating with defendants, who owned and operated several urgent care clinics in North Carolina, through their ownership in Urgent Cares of America, Inc. ("UCA"). Plaintiffs and defendants agreed to form a corporation, Boone Urgent Care, Inc. ("Boone UC"), in which each participant would own an equal interest. According to plaintiffs, defendants represented that they were neither contemplating nor negotiating any mergers, consolidations, or asset sales involving Boone UC.

In forming Boone UC, the four parties entered into a shareholders' agreement, in which each shareholder held a twenty-five percent (25%) ownership interest in exchange for a capital contribution of $37,500.00. The shareholders' agreement established a three-person Board of Directors with voting power, comprising defendants and Grasinger; Benuck held a non-voting position of "Board Observer." In addition, the shareholders' agreement contained a "drag-along rights" provision, whereby all shareholders would be forced to sell their shares and vote in favor of any

merger, consolidation, or asset sale approved by a majority of Boone UC's Board of Directors.

After each party signed the shareholders' agreement, Boone UC opened and operated with success from January to October 2010, when defendants called a special meeting of the Board of Directors to discuss a potential sale of Boone UC. During this meeting, plaintiffs objected to the sale, but defendants, comprising a majority of the Board of Directors with voting power, voted in favor of the sale and exercised their "drag-along rights" to approve the sale. UCA purchased Boone UC and seven other urgent care facilities for a total purchase price of $22,000,000.00, of which $165,000.00 was assigned to Boone UC without an independent business valuation. Defendants unilaterally dissolved Boone UC and each shareholder received payment of $41,250.00 for the value of his initial contribution plus ten percent from the proceeds of the transaction. Defendants had ownership interests in the other urgent care facilities involved in the transaction.

Plaintiffs filed a verified complaint on 2 October 2013 and an amended complaint on 6 November 2013, asserting causes of action for (1) breach of fiduciary duty; (2) breach of contract; (3) constructive fraud, constructive trust, and accounting; (4) civil conspiracy; (5) unfair or deceptive practices; (6) conversion; and (7) unjust

enrichment. On 25 October 2013, this case was designated as a mandatory complex business case pursuant to N.C. Gen. Stat. § 7A-45.4(b).[1]

On 9 December 2013, defendants filed an answer and motion to dismiss all claims under Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief could be granted. On 16 January 2015, the trial court granted defendants' motion to dismiss all claims except the breach of contract claim. On 13 February 2015, plaintiffs voluntarily dismissed, without prejudice, the remaining breach of contract claim. Plaintiffs appeal from the trial court's 16 January 2015 order.

II. Analysis

Plaintiffs contend that the trial court erred by dismissing their claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). We disagree.

"We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship,* 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

[1] Plaintiffs filed a motion to amend the record on appeal to include the notice of designation showing that the instant case was in fact designated as a mandatory complex business case on 25 October 2013. Accordingly, jurisdiction is appropriate in this Court over this appeal and, in the interests of justice, we granted plaintiffs' motion in order to reach the merits of the case.

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Peninsula Prop. Owners Ass'n, Inc. v. Crescent Res., LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353 (2005). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial Courier Express, Inc.,* 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005) (citations omitted). "Standing . . . is therefore properly challenged by a Rule 12(b)(1) motion to dismiss." *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (citations omitted).

"As a general rule, shareholders have no right to bring actions 'in their [individual] names to enforce causes of action accruing to the corporation[,]' *Fulton v. Talbert*, 255 N.C. 183, 185, 120 S.E.2d 410, 412 (1961), but must assert such claims derivatively on behalf of the corporation." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000) (alterations in original) (citing Russell M. Robinson, II, *Robinson On North Carolina Corporation Law* § 17–2(a) at 333 (5th ed.1995)). However, our Supreme Court has recognized two exceptions: (1) where "the wrongdoer owed [the shareholder] a special duty[,]" or (2) where the shareholder suffered an injury "separate and distinct from the injury sustained by the other shareholders or the corporation itself." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 659, 488 S.E.2d 215, 219 (1997) (citation omitted).

"Accordingly, an evaluation of [plaintiffs'] standing . . . requires an analysis of: (1) [plaintiffs'] alleged injury, and (2) the relationship between [plaintiffs] and defendants with respect to each claim." *Energy Inv'rs Fund, L.P. v. Metric Constructors, Inc.,* 351 N.C. 331, 335, 525 S.E.2d 441, 444 (2000).

A. Particularized Injury

Plaintiffs contend that the trial court erred by finding that their injury was not "separate and distinct" from the corporation. We disagree.

"An injury is peculiar or personal to the shareholder if 'a legal basis exists to support plaintiffs' allegations of an individual loss, separate and distinct from any damage suffered by the corporation.' " *Barger*, 346 N.C. at 659, 488 S.E.2d at 220. In *Barger*, "[t]he only injury plaintiffs as shareholders allege[d] [was] the diminution or destruction of the value of their shares." *Id.* Our Supreme Court held this showing of injury was insufficient because it was "precisely the injury suffered by the corporation itself." *Id.*

In the instant case, plaintiffs assert that defendants arbitrarily undervalued Boone UC in the sale to UCA, thereby diminishing the value of their shares. However, all four shareholders received the same amount for the proceeds paid for the purchase of Boone UC based on their equal interests. Thus, as in *Barger*, the injury plaintiffs allege is precisely the injury suffered by the corporation itself, and

by defendants. Because plaintiffs failed to demonstrate that they suffered damages separate and distinct from Boone UC, *see id.*, we overrule plaintiffs' challenge.

B. Special Duty

Plaintiffs further contend that the trial court erred by finding defendants did not owe them a special duty as contemplated by *Barger*'s other exception. Specifically, plaintiffs contend that, although plaintiffs and defendants were equal shareholders, by virtue of defendants' control of the Board and the "drag-along rights" provision, the imbalance between plaintiffs and defendants was that of a minority shareholder situation, sufficient to meet *Barger*'s exception. We disagree.

"The existence of a special duty . . . would be established by facts showing that defendants owed a duty to plaintiffs that was personal to plaintiffs as shareholders and was separate and distinct from the duty defendants owed the corporation." *Id.*

> A special duty therefore has been found when the wrongful actions of a party induced an individual to become a shareholder; when a party violated its fiduciary duty to the shareholder; when the party performed individualized services directly for the shareholder; and when a party undertook to advise shareholders independently of the corporation.

Id. "This list is illustrative; it is not an exclusive list of all factual situations in which a special duty may be found." *Id.*

North Carolina "cases have consistently held that majority shareholders in a close corporation owe a 'special duty' and obligation of good faith to *minority shareholders*." *Norman*, 140 N.C. App. at 407, 537 S.E.2d at 260 (emphasis added).

This Court has explained the rationale behind permitting minority shareholders to bring individual claims:

> [T]he recovery in a derivative action goes to the corporation. . . . Thus, disposition of the recovery in a derivative action based on wrongdoing by the directors of a corporation would be under the control of the wrongdoers. . . . It would be unrealistic to expect the interests of plaintiff minority shareholders who prevail in a derivative action to be protected by defendant majority shareholders who have allegedly converted, appropriated, and wasted corporate assets.

Id. at 405, 537 S.E.2d at 259 (internal citations omitted). However, plaintiffs cite no authority, and our research discloses none, that recognizes *Barger*'s special duty exception in situations involving *equal* shareholders where, as here, the aggrieved shareholders cannot demonstrate an injury separate and distinct from the corporation. *See, e.g., id.* at 405, 537 S.E.2d at 259 (holding that "*minority shareholders* in a closely held corporation who allege wrongful conduct and corruption against the majority shareholders in the corporation may bring an individual action against those shareholders, in addition to maintaining a derivative action on behalf of the corporation") (emphasis added).

In *Outen v. Mical*, 118 N.C. App. 263, 454 S.E.2d 883 (1995), this Court declined to find a special duty exception between equal shareholders in a closely held corporation, on the basis that "while plaintiff and defendant may have had a special relationship because each was a fifty percent shareholder, plaintiff did not show that

he suffered a loss different from the loss to the corporation." *Id.* at 267, 454 S.E.2d at 886. In *Aubin v. Susi*, 149 N.C. App. 320, 560 S.E.2d 875 (2002), this Court relied on *Outen* to hold that a fifty-percent shareholder of a closely held corporation "cannot maintain an action against defendants for her individual recovery absent a showing that she has sustained 'a loss peculiar to herself by reason of some special circumstances or special relationship' to defendants." *Id.* at 326, 560 S.E.2d at 879–80 (internal ellipses and quotation marks omitted) (citing *Outen*, 118 N.C. App. at 266, 454 S.E.2d at 885). Although *Outen* was decided prior to *Barger*, the *Aubin* Court rejected a similar argument that a special duty exception exists by virtue of a fifty-fifty shareholder relationship alone. The *Aubin* Court explained:

> As we held in *Outen,* plaintiff cannot carry this burden by simply alleging a special circumstance or relationship due to the fact that she and Susi are fifty percent shareholders in a closely-held corporation. Plaintiff has simply failed to show that she has sustained a loss different from that sustained by Bluebird as a result of Susi's transfer of Harborgate to The Susi Corporation as opposed to Bluebird. Therefore, plaintiff does not have standing to maintain a direct action seeking individual recovery against defendants based upon her allegations in this suit.

Id. at 326, 560 S.E.2d at 880.

In the instant case, plaintiffs and defendants were equal, not minority, shareholders. Additionally, plaintiffs have failed to allege an injury separate and distinct from the injury allegedly suffered by Boone UC. As in *Outen* and *Aubin*, plaintiffs have failed to show that they sustained "a loss peculiar to [themselves] by

reason of some special circumstance or special relationship" to defendants. Moreover, although Boone UC was a closely held corporation, the concerns for protecting minority shareholders as stated in *Norman* are inapplicable, since there is no majority of shareholders controlling the recovery.

Each shareholder held an equal share of Boone UC; therefore, each shareholder received an equal amount of proceeds from its sale. Plaintiffs have alleged no facts from which it may be inferred that defendants owed plaintiffs, in their capacities as shareholders, a duty that was personal to them and greater and distinct from the duty defendants owed to the corporation.

Accordingly, as in *Aubin*, we hold that since plaintiffs were equal shareholders with defendants and have failed to demonstrate an injury separate and distinct from that of Boone UC, the special duty exception does not apply and plaintiffs lacked standing to bring their individual claims against defendants.

III. Conclusion

Because plaintiffs have failed to demonstrate an individualized harm or a special relationship, plaintiffs lacked standing to bring these individual claims against defendants. Therefore, we affirm the trial court's order dismissing plaintiffs' claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

AFFIRMED.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).