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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-738

Filed: 19 April 2016

Wake County, No. 11 CVS 3217

KENNETH E. NELSON, Plaintiff,

v.

ALLIANCE HOSPITALITY MANAGEMENT, LLC, a Georgia limited liability company, ROLF A. TWEETEN, and AXIS HOSPITALITY, INC., an Illinois corporation, Defendants.

Appeal by plaintiff from order entered 20 August 2013 by Judge James L. Gale in Wake County Superior Court. Heard in the Court of Appeals 1 December 2015.

Meynardie & Nanney, PLLC, by Joseph H. Nanney, Jr., for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Jackson Wyatt Moore, Jr. and Michael W. Mitchell, and Leader, Bulso & Nolan, PLC, by Eugene N. Bulso, Jr., for defendant-appellees.

McCULLOUGH, Judge.

Kenneth E. Nelson (“plaintiff”) appeals from an order, granting Alliance Hospitality Management, LLC (“Alliance”), Rolf A. Tweeten (“Tweeten”), and Axis Hospitality, Inc.’s (“Axis”) (collectively referred to as “defendants”) motion for summary judgment as to plaintiff’s claim for damages. Based on the reasons set forth herein, we affirm the order of the trial court.

I. Background

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Alliance is a Georgia limited liability company, providing hotel management services, with its principal place of business in Wake County, North Carolina. Axis is an Illinois corporation with its principal place of business in Wake County, North Carolina. Axis is owned solely by Tweeten. Sometime in 2007, Tweeten, through Axis, purchased a majority interest in Alliance. Tweeten had hired plaintiff as a consultant to help him investigate and acquire the majority interest in Alliance. Plaintiff and Tweeten allegedly reached an oral agreement that plaintiff would receive a 10% stake in Alliance. Plaintiff was a member of Alliance's board of directors and eventually became CFO of Alliance until January 2011.

In a separate series of events, plaintiff had judgments entered against him in several other jurisdictions. On 7 October 2004, a Tennessee state-court judgment in the amount of \$797,615.00 was entered against plaintiff in favor of Orlando Residence, Ltd. ("ORL"), an unrelated third-party (referred to as "the Tennessee judgment"). The superior court of North Carolina issued an order on 12 May 2011, finding that the total outstanding balance of the Tennessee judgment as of 25 April 2011 was \$121,127.85, with \$32.17 in interest accruing per diem. In order to satisfy the Tennessee judgment, ORL enforced the judgment in Wisconsin and two houses belonging to plaintiff's wife, Mrs. Nelson, were sold at sheriff's sales on 9 September 2010 ("the Wisconsin houses"). The time for plaintiff to redeem the Wisconsin houses expired on 9 September 2011. On 15 August 2012, the U.S. District

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Court for the District of South Carolina entered a judgment in favor of ORL against plaintiff in the amount of \$4 million (“the South Carolina judgment”). ORL then filed the South Carolina judgment in Wake County superior court on 11 September 2012 and ORL’s motion to enforce that judgment was granted on 13 February 2013.

On 25 February 2011, plaintiff filed a complaint against defendants. On 1 June 2011, plaintiff filed an amended complaint bringing the following claims: (1) breach of fiduciary duty; (2) constructive fraud; (3) judicial dissolution of Alliance; (4) a declaratory judgment that plaintiff owns 10 of Alliance’s 61 outstanding membership interest units; and (5) breach of contract/wrongful termination. Plaintiff alleged as follows: Prior to purchasing an interest in Alliance, Tweeten contacted plaintiff to seek plaintiff’s help in managing Alliance. Plaintiff agreed to work with Tweeten and became a member of Alliance’s board of directors in August 2007. In January 2008, Tweeten promised plaintiff a 20% stake in Alliance. The next morning, Tweeten asked if the 20% stake could be reduced to 10% and plaintiff agreed to the reduction. In February 2008, Alliance adopted an operating agreement using membership interests or units rather than percentage ownership. At that time, Alliance had 100 membership interests or units. On or about 21 March 2008, Alliance purchased 29 units from Tweeten, reducing the number of outstanding units to 71. Axis owned 51 units and Keith Hansen, Alliance’s CFO at that time, owned 20 units.

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Plaintiff alleged that on 3 June 2009, Tweeten and plaintiff executed a Consent Resolution stating that Alliance would issue plaintiff 10 membership units as compensation for his ongoing services. Based upon Tweeten's assurances that plaintiff would be fully involved in participating in the management of Alliance, plaintiff left his home in Wisconsin and moved to Cary, North Carolina. In April 2010, Alliance purchased 20 units from Keith Hansen and as a result, the number of outstanding units was reduced from 81 to 61. On 24 September 2010, Tweeten signed a document entitled "Admission of Member" that formally gave 10 membership units to plaintiff, effective 23 March 2010. In early 2010, plaintiff and Tweeten discussed various proposals to either merge Alliance with another company or to sell substantially all of Alliance's assets to another management company. On 19 November 2010, Tweeten halted discussions by informing plaintiff that Alliance would not be sold and no further negotiations undertaken.

Plaintiff further alleged that at some time after 19 November 2010, Tweeten engaged in secret negotiations with Interstate Management Company, LLC ("Interstate") to sell substantially all of Alliance's assets. On 19 January 2011, Tweeten purported to remove plaintiff from Alliance's board of directors. On 28 January 2011, Tweeten, on behalf of Alliance, and Interstate executed a contract under which Interstate would purchase substantially all of Alliance's assets. On 31 January 2011, Tweeten purported to terminate plaintiff as CFO of Alliance. A

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week later, Tweeten informed plaintiff of the contract between Alliance and Interstate which closed on or about 1 April 2011. Plaintiff alleged that Alliance would receive \$8.5 million from the sale and that Alliance would reduce in size from managing 50 hotels to managing 15.

Plaintiff alleged that on 11 May 2011, plaintiff, by and through his counsel, wrote to counsel for Alliance to request that the excess funds be distributed pursuant to the terms of Section 7.3 of the Operating Agreement which provided as follows: “Company Sales Proceeds, to the extent available, shall be distributed to the Members in the discretion of the Manager, in accordance with the Members’ respective Percentage Interests.” On 27 May 2011, counsel for Alliance, on behalf of Alliance, Axis, and Tweeten refused to distribute the funds.

On 24 March 2011, the matter was designated a complex business case.

On 28 February 2011, defendants filed an answer and counterclaim, filed an amended counterclaim on 11 April 2011, and filed a second amended counterclaim on 11 July 2011. Axis dismissed its counterclaims on 15 February 2012 and Tweeten and Alliance dismissed its counterclaims on 28 August 2012.

On 22 November 2011, the trial court dismissed plaintiff’s breach of contract/wrongful termination claim.

Defendants filed two summary judgment motions. The first summary judgment motion, which is not included in the record on appeal, was regarding

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plaintiff's claim for a declaratory judgment that he is a member of Alliance and the extent of his ownership interest in Alliance. The 3 January 2013 "Order and Opinion" regarding this first motion for summary judgment is included in the record on appeal. In this order, the trial court denied defendants' motion for summary judgment and concluded that "the issues of whether [plaintiff] is insolvent, and if insolvent, whether he has lost his status of Member due to insolvency, and the extent of [plaintiff's] ownership interest in Alliance, depended upon the resolution of disputed material facts."

In their second motion, entered 20 March 2013, defendants moved for summary judgment with regard to all of plaintiff's claims for consequential, punitive, and other damages. Plaintiff set forth the following categories of damages: damages incurred from the sheriff's sale of the Wisconsin houses; ORL's purchase of a South Carolina Confession of Judgment executed by plaintiff; attorney's fees incurred in connection with the sheriff's sales; moving expenses incurred in vacating one of the Wisconsin houses; the loss of value in plaintiff's interest in Alliance; and, punitive damages. Plaintiff's claims for damages is based on his argument that had defendants properly distributed the sales proceeds from the sale of Alliance to Interstate, plaintiff would not have had to sell the Wisconsin houses to satisfy the Tennessee judgment, plaintiff could have paid ORL in a timely manner, and ORL

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would not have been forced to obtain the South Carolina judgment against him or enforce it in North Carolina.

In an order entered 20 August 2013, the trial court held that Georgia law governed plaintiff's breach of fiduciary duty and constructive fraud claims, as well as the damages arising out of those claims. The trial court also held that plaintiff had failed to show, as a matter of law, that defendants' actions in refusing to distribute the sale proceeds proximately caused the loss of the Wisconsin houses. Rather, the trial court held that the losses of the Wisconsin houses "were caused by [plaintiff's] failure to pay his debts. Defendants' acts here are not a proximate cause." Defendants' motion was granted "insofar as it seeks to dismiss [plaintiff's] claims for damages for the loss of [the Wisconsin houses], including the moving expenses and attorneys' fees related to those properties, and this claim for damages is DISMISSED."

In regards to plaintiff's argument that had Tweeten timely distributed the sale proceeds, plaintiff could have been able to pay in full the obligation owed to ORL and avoided the South Carolina judgment, the trial court noted that "[t]he fact remains that [plaintiff] has legally been obligated to pay the \$4 million South Carolina Judgment since 1994[.]" The trial court held that plaintiff "fail[ed] to present facts adequate to demonstrate a proximate causal link between Defendants' acts and the damages he claims." Accordingly, plaintiff's claim for damages arising out of ORL

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obtaining a judgment against plaintiff in South Carolina was dismissed. Because the trial court determined that plaintiff was not entitled to any compensatory damages, the trial court also held that plaintiff was not entitled to any punitive damages and granted defendant's motion to the extent it sought to dismiss plaintiff's claim for punitive damages.

The trial court noted in its 20 August 2013 order that in his amended complaint, plaintiff argued that the transaction with Interstate left Alliance "unable to operate profitably, and that the decision to continue operating Alliance is being made in bad faith to allow Tweeten to use Alliance as 'his personal bank.'" Plaintiff claimed that the value of his ownership interest in Alliance "is diminishing due to Tweeten's actions, including making loans to Tweeten's affiliates, paying himself the same salary Tweeten received when Alliance was a much larger company, and paying Tweeten's wife a large salary for working only a few days per week." The trial court held that under Georgia law, "the action for breach of fiduciary duty for mismanagement of Alliance's funds if proper at all should have been brought derivatively on behalf of Alliance. Consequently, [plaintiff] can not recover directly for the alleged mismanagement, and may not recover damages based on his alleged lost value in Alliance." Plaintiff's claim for damages for diminution of share value was dismissed.

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By granting summary judgment in favor of defendants, the trial court dismissed plaintiff's claims for breach of fiduciary duty and constructive fraud, leaving plaintiff's claims for judicial dissolution and for a declaratory judgment.

Plaintiff appealed the 20 August 2013 order to our Court. In an unpublished opinion filed 20 May 2014, our Court dismissed plaintiff's appeal as interlocutory. *Nelson v. Alliance*, __ N.C. App. __, 761 S.E.2d 755, 2014 WL 2123244 (May 2014) (unpub.).

On 26 September 2014, plaintiff filed a motion for reconsideration which was denied by order entered 7 November 2014.

The case was called for trial at the 16 March 2015 civil session of Wake County Superior Court, the Honorable James L. Gale presiding. Prior to the commencement of trial, the parties voluntarily dismissed all other claims and counterclaims asserted in the action. On 16 March 2015, a jury found that Alliance's board of directors issued 10 membership units to plaintiff and that section 3.1.12 of the Operating Agreement did not void the transfer of the membership units. Based on the jury's decision, on 27 March 2015, the trial court ordered that plaintiff is the holder of 10 membership units in Alliance and that the Board of Directors of Alliance "shall adopt a resolution, or otherwise amend the corporate records, to reflect that [plaintiff] owns 10 membership units."

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Plaintiff appeals from the 20 August 2013 order granting summary judgment in favor of defendants on plaintiff's claim for damages.

II. Standard of Review

Rule 56 of the North Carolina Rules of Civil Procedure provide that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. A defendant may meet this burden by: (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.

James v. Clark, 118 N.C. App. 178, 180-81, 454 S.E.2d 826, 828 (1995) (citation and quotation marks omitted). "Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

III. Discussion

On appeal, plaintiff argues that the trial court erred by (A) dismissing plaintiff's damage claims on summary judgment and (B) ruling that the diminution

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of the value of plaintiff's interest in Alliance is recoverable only in a derivative action.

We address each argument in turn.

A. Plaintiff's Damage Claims

Plaintiff argues that the trial court erred by dismissing his damage claims on summary judgment. Plaintiff concedes that the trial court properly held that Georgia law governs his breach of fiduciary duty and constructive fraud claims, as well as damages arising out of those claims.

First, plaintiff contends that Georgia law *requires* that plaintiff's damages go to the jury. He cites to the Official Code of Georgia Annotated, section 51-12-10 which provides that "[w]hen a tort is committed, a contract is broken, or a duty is omitted with knowledge and for the purpose of depriving the plaintiff of certain contemplated benefits, the remote damages occasioned thereby become a proper subject for the consideration of the jury." O.C.G.A. § 51-12-10 (2015). Plaintiff argues that the statute applies to the present case because breach of fiduciary duty is a tort, Tweeten breached a contract with plaintiff, and Tweeten owed duties to plaintiff which were omitted.

Plaintiff's argument rests on the presumption that O.C.G.A. § 51-12-10 precludes plaintiff's damage claims from summary disposition. We do not find this to be the case. In *Whiteside v. Decker*, 310 Ga. App. 16, 712 S.E.2d 87 (2011), the Court of Appeals of Georgia affirmed the trial court's granting of summary judgment

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in favor of the defendants based on the “absence of evidence in the record sufficient to show that the alleged violation of fiduciary duties was a proximate cause of the damages sought.” *Id.* at 18, 712 S.E.2d at 90. On appeal, the plaintiff argued that he was entitled to jury consideration of “remote damages” under O.C.G.A. § 51-12-10 and the Court of Appeals of Georgia disagreed, holding there was no evidence that the alleged violations of fiduciary duties were for the purpose of causing the alleged remote damages. *Id.* at 20, 712 S.E.2d at 91. Accordingly, the Court of Appeals of Georgia held that the trial court correctly granted summary judgment in favor of the defendants. *Id.* Likewise, we hold that plaintiff was not entitled to jury consideration of remote damages pursuant to O.C.G.A. § 51-12-10.

Next, plaintiff, while asserting that “intended results are never remote under Georgia Law,” argues that because defendants intended the results in question, that all of the damages plaintiff seeks to recover were proximately caused by Tweeten’s breach of his fiduciary duty. We disagree.

“It is well settled that a claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach.” *Griffin v. Fowler*, 260 Ga. App. 443, 445, 579 S.E.2d 848, 850 (2003).

To establish proximate cause, a plaintiff must show a legally attributable causal connection between the defendant’s conduct and the alleged injury. The plaintiff must introduce evidence which affords a reasonable basis

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for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to grant summary judgment for the defendant.

Grinold v. Farist, 284 Ga. App. 120, 121-22, 643 S.E.2d 253, 254 (2007) (citations and quotation marks omitted). “In the absence of specific proof of the amount of damages flowing from a tortious act, general or nominal damages may be inferred, but the defendant’s liability for the damages must be established, including proof that the tortious act was the proximate cause of some actual loss.” *Whiteside*, 310 Ga. App. at 20, 712 S.E.2d at 91.

“Constructive fraud consists of any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another.” O.C.G.A. § 23-2-51 (2015). “However, this theory is an equitable doctrine and cannot be asserted as a means to recover damages.” *Aliabadi v. McCar Dev. Corp.*, 249 Ga. App. 309, 313, 547 S.E.2d 607, 611 (2001).

In plaintiff’s response to defendants’ motion for summary judgment as to damages, plaintiff argued that had Alliance distributed the Interstate proceeds, the Wisconsin houses would not have been sold below their “market value” and that he would have been able to redeem the properties one year after the sale. Plaintiff

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maintained that one Wisconsin house was appraised at \$634,000.00 but was sold for \$225,000.00 on 9 September 2010. Plaintiff also argued that the other Wisconsin house was appraised at \$206,000.00 but was sold for \$50,000.00 on 9 September 2010.

The record demonstrates that on 7 October 2004, a Tennessee court entered judgment in the amount of \$797,615.00 against plaintiff in favor of ORL. In order to satisfy the Tennessee judgment, ORL enforced the judgment in Wisconsin and pursuant to a court order, two houses belonging to plaintiff's wife, Mrs. Nelson, were sold at sheriff's sales on 9 September 2010 ("the Wisconsin houses"). The contract between Alliance and Interstate closed on or about 1 April 2011. On 11 May 2011, plaintiff alleged that he, through his counsel, sent a letter to Alliance's counsel, requesting that the sale proceeds be distributed. On 12 May 2011, a charging order was entered in Wake County Superior Court, finding that the total outstanding balance of the Tennessee judgment as of 25 April 2011 was \$121,127.85, with \$32.17 in interest accruing per diem. The charging order provided that any distributions, allocations, or payments in any form due from Alliance to plaintiff up to \$121,127.85 shall not be paid to plaintiff but paid to ORL.

After careful review, we also reach the same conclusion the trial court reached in its 20 August 2013 summary judgment order. Plaintiff has failed to demonstrate how defendants' failure to distribute the sale proceeds proximately caused the Wisconsin houses to be sold in foreclosure, allegedly below their market value.

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Plaintiff has also failed to demonstrate how defendants' alleged misconduct proximately caused plaintiff to incur attorney's fees in connection with the sheriff's sales and moving expenses incurred in vacating one of the Wisconsin houses. The Wisconsin houses were sold because plaintiff was unable to pay in full the Tennessee judgment entered against him nearly six years prior to the sale of the houses. Defendants' alleged misconduct was not the cause in fact of the Wisconsin houses being sold. For these reasons, we hold that plaintiff has failed to show a legal attributable causal connection between defendants' conduct and the alleged injuries and affirm the trial court's dismissal of plaintiff's claim of damages based on the Wisconsin houses.

Plaintiff also argued in his response to defendants' motion for summary judgment as to damages that Tweeten had caused ORL to be able to purchase a \$4 million South Carolina judgment. Specifically, plaintiff contends that had defendants distributed the sale proceeds of the Interstate contract, he could have paid in full the obligation owed to ORL and consequently, ORL would not have obtained the South Carolina judgment against plaintiff.

It is undisputed that in 1994, plaintiff executed a Confession of Judgment in favor of the Resolution Trust Corporation in the amount of \$4 million in the U.S. District Court for the District of South Carolina. On 23 February 1995, Asset Recovery & Management Services, L.P. became the successor-in-interest to all rights

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of Resolution Trust Corporation, including the South Carolina judgment. Thereafter, Asset Recovery & Management Services, L.P. assigned the South Carolina judgment to GP Credit Company for \$20,000.00 on 30 November 1995. Mrs. Nelson signed the purchase agreement on behalf of GP Credit Company. ORL filed a motion to apply property to judgment and on 7 June 2011, the Circuit Court of Ozaukee County, Wisconsin filed an order, finding that the South Carolina judgment divested from GP Credit Company and vested in ORL, and awarding a \$20,000.00 credit against ORL's judgment against plaintiff. ORL filed this judgment in the U.S. District Court for the District of South Carolina and on 15 August 2012, the South Carolina court issued a judgment in favor of ORL against plaintiff in the amount of \$4 million. ORL filed this judgment in Wake County Superior Court on 11 September 2012 and ORL's motion to enforce the South Carolina judgment was granted on 13 February 2013.

Based on the record before us, it is evident that there existed a \$4 million judgment that plaintiff was legally required to pay since 1994. The South Carolina judgment was no in way originally incurred by plaintiff as a result of defendants' actions. Furthermore, plaintiff has failed to introduce evidence establishing a reasonable basis for us to reach a conclusion that it is more likely than not that the defendants' failure to distribute the sale proceeds was a cause-in-fact of ORL obtaining the South Carolina judgment. Therefore, we hold that the trial court did not err by concluding that defendants' acts did not proximately cause plaintiff to lose

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the Wisconsin houses and that defendants' acts did not proximately cause plaintiff to pay the South Carolina judgment. We affirm the trial court's dismissal of plaintiff's claims for damages arising out of ORL's purchase of the South Carolina judgment.

In his next argument, plaintiff maintains that the trial court erred by granting summary judgment as to damages because he should have been able to submit the issue of nominal damages to a jury. We disagree. "Under O.C.G.A. § 51-12-4, nominal damages are only available upon a showing of injury." *Nalley v. Langdale*, 319 Ga. App. 354, 370, 734 S.E.2d 908, 920 (2012). The Court of Appeals of Georgia has made it clear that "[t]o successfully bring a tort claim for breach of [fiduciary] duty, however, the claimant must show injury. . . . Where no actual damage flows from the injury, nominal damages may be awarded. Yet, some injury – even if small or nominal – is necessary." *Willett v. Russell M. Stookey, P.C.*, 256 Ga. App. 403, 411-12, 568 S.E.2d 520, 528 (2002) (citation omitted). In the case before us, plaintiff was unable to demonstrate any actual injuries that resulted from the alleged breach of fiduciary duty by defendants. Consequently, we hold that the trial court did not err by not submitting the issue of nominal damages to a jury.

Finally, plaintiff argues that the trial court erred by granting summary judgment as to damages because the issue of punitive damages should have gone to the jury. This argument has no merit.

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The Georgia courts have made it clear “[a] claim for punitive damages has efficacy only if there is a valid claim for actual damages to which it could attach. Punitive damages may not be recovered where there is no entitlement to compensatory damages.” *S. General Ins. Co. v. Holt*, 262 Ga. 267, 270, 416 S.E.2d 274, 276-77 (1992) (citation omitted). Because we have previously held that the trial court dismissed plaintiff’s claims for damages properly, plaintiff is not entitled to any punitive damages and the trial court did not err by concluding similarly.

B. Diminution of the Value of Plaintiff’s Interest in Alliance

In his second issue on appeal, plaintiff argues that the trial court erred by concluding that the action for breach of fiduciary duty for mismanagement of Alliance’s funds “if proper at all should have been brought derivatively on behalf of Alliance” and by entering summary judgment in favor of defendants on plaintiff’s claim of damages for diminution of the value of his interest in Alliance. We do not agree.

We first note that in plaintiff’s response to defendants’ motion for summary judgment as to damages, plaintiff asserted that he was entitled to damages resulting from the loss of value of his interest in Alliance after Tweeten modified the structure of the Interstate transaction so that Alliance “would sell all of its management contracts, thereby preventing any payment to [plaintiff] directly” and so that “Alliance retained some management contracts, thereby reducing the sale proceeds.”

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The trial court noted in its 20 August 2013 order that plaintiff admitted these arguments had not been raised in the pleadings prior to his response to defendants' motion for summary judgment as to damages and admitted "he is no longer pursuing that theory." Plaintiff does not challenge this on appeal.

In his amended complaint, plaintiff alleged that the Interstate transaction left Alliance unable to operate profitably, any election to continue the business of Alliance after the Interstate transaction was made in bad faith, and Tweeten was using Alliance as his personal bank. On appeal, plaintiff does not specify what acts of defendants caused the alleged diminution of the value of his interest in Alliance. However, we interpret plaintiff's claim to be that based on the mismanagement of Alliance's funds by Tweeten, the value of his ownership interest in Alliance is diminishing.

The general rule is that a shareholder suit seeking to recover damages based on a breach of fiduciary duty may only bring a derivative suit on behalf of the corporation. *Phoenix Airline Servs. v. Metro Airlines*, 260 Ga. 584, 585, 397 S.E.2d 699, 701 (1990). Nonetheless, a direct action may be brought when

the reasons requiring derivative suits do not exist. The reasons underlying the general rule are that 1) it prevents a multiplicity of lawsuits by shareholders; 2) it protects corporate creditors by putting the proceeds of the recovery back in the corporation; 3) it protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and 4)

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it adequately compensates the injured shareholder by increasing the value of his shares.

Thomas v. Dickson, 250 Ga. 772, 774, 301 S.E.2d 49, 51 (1983).

On appeal, plaintiff argues that none of the four reasons stated in *Thomas* exist in the facts here. However, after reviewing the record, we are unable to reach the same conclusion. The makeup of the present members of Alliance is unclear and there is evidence that there are outstanding creditors of Alliance. We agree with defendants' argument that plaintiff "has not shown that diversion of any recovery on his claims from Alliance to himself would not endanger those creditors[.]" Therefore, the trial court properly found that plaintiff's claim, if proper at all, should have been brought derivatively on behalf of Alliance. Accordingly, we affirm the trial court's dismissal of plaintiff's claim of damages for diminution of share value.

IV. Conclusion

We affirm the 20 August 2013 order of the trial court, granting summary judgment in favor of defendants.

AFFIRMED.

Judges BRYANT and GEER concur.

Report per Rule 30(e).