



SHENANDOAH CORPORATION, Plaintiff, v. JOANNE BECKER, et al., Defendants.

Case No. 2014 CA 007767 B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION

2015 D.C. Super. LEXIS 1

February 3, 2015, Decided

COUNSEL: [*1] Mark P. Friedlander, Jr., Esq., Friedlander, Friedlander & Earman, P.C., McLean, VA, Counsel for Plaintiff.

Stephen D. Charnoff, Esq., REES BROOME, PC, Tysons Corner, VA, Counsel for Defendants Joanne, Adam, and Brian Becker and Robin Tacchetti.

JUDGES: Judge Jeanette J. Clark, D.C. Superior Judge.

OPINION BY: Jeanette J. Clark

OPINION

Next Event: CLOSED CASE

ORDER GRANTING MOTION TO DISMISS PURSUANT TO SUPERIOR COURT CIVIL RULES 12(b)(2) AND 12(b)(6) (OPPOSED BY PLAINTIFF)

Upon consideration of Defendants' Motion to Dismiss Pursuant to Superior Court Civil Rules 12(b)(2) and 12(b)(6) (Opposed By Plaintiff) ("Opposition") that was filed on January 8, 2015, Plaintiff's Points and Authorities in Opposition to Defendants' Motion to Dismiss ("Opposition") that was filed on January 21, 2015, Reply to Opposition to Motion to Dismiss ("Reply") that was filed on January 28, 2014, and the record herein, the Motion is granted for the reasons stated below.

I. FACTUAL AND PROCEDURAL HISTORY

On December 6, 2014, Plaintiff filed a "Complaint" for Count I: "Breach of Contract and Specific Perform-

mance" and Count II: "Misappropriation and Conversion."

In response, Defendants filed the instant Motion. Defendants state, *inter alia*, that

[t]he Silberbergs, instead of following the law, as laid out in the Beckers' October, 2014 Memorandum [*2] in Support of Motion to Dismiss and endorsed by the Superior Court in its November 21, 2014 Order, opted to, in essence, impersonate Shenandoah by filing the instant lawsuit in Shenandoah's name. The controlling derivative proceeding statute, *D.C. Code* § 29-305.52, requires that the Silberbergs first demand that Shenandoah sue Joanne Becker, Robin Tacchetti, and Adam Becker for breach of the Stock Redemption Agreement. Only upon Shenandoah refusing to do so, or failing to respond within ninety days, could the Silberbergs file a derivative suit on behalf of Shenandoah. Moreover, the Silberbergs would have to, in the body of the derivative Complaint, denote the derivative nature of the proceeding and specifically allege that they fulfilled the statutory demand requirements. *Sup. Ct. Civ. R. 23.1*.

The Silberbergs bypassed all legal prerequisites and simply filed a non-verified Complaint in Shenandoah Corporation's name, despite the fact that the Beckers' counsel and the Superior Court had offered them a legal roadmap

of how to proceed upon their claims in the correct manner.

Mot. Mem. at 4-5

Plaintiff's Opposition agrees that "the Silberberg family could not bring a minority stockholder derivative action without having [*3] complied with the specific procedural steps required by code." Opp'n at ¶ 7. However Plaintiff distinguishes the instant case, stating that "the action by Shenandoah in the instant case . . . is a direct action and not a derivative action. *Id.* (emphasis in original).

In response, Defendants state, in part, that

In filing the instant Complaint, the Silberbergs, instead of complying with the pre-litigation demand statute, *see, D.C. Code § 29-305.52*, or the pleading requirements regarding derivative proceedings, *see, Sup. Ct. Civ. R. 23.1*, simply chose to impersonate Shenandoah.

The Opposition argues that the Silberbergs have, in fact, complied with the law because the instant lawsuit is a "direct" claim by Shenandoah. *See, Opposition, ¶ 7*. No, it is not. The point of asking the Court to take judicial notice of the First Lawsuit is to demonstrate that the Silberbergs are not in control of Shenandoah Corporation; the Beckers, who all parties agree control a majority of Shenandoah's shares (and thus can, and did, elect its present Board of Directors), are in control of Shenandoah Corporation. It is exactly that control that led the Silberbergs to complain to the Court, in the First Lawsuit, that they are suffering oppression [*4] at the hands of the Beckers.

Reply at 2.

II. STANDARD OF REVIEW

It is well-established that

Standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims. This is a longstanding principle emphasized in federal case law since *Warth, supra*, where the Court unequivocally stated that Article III "standing in no

way depends on the merits of the plaintiff's contention that particular conduct is illegal. Thus, the basic function of the standing inquiry is to serve as a threshold a plaintiff must surmount *before* a court will decide the merits question about the existence of a claimed legal right. If a plaintiff's factual allegations are sufficient to require a court to consider whether the plaintiff has a statutory (or otherwise legally protected right), then the Article III standing requirement has served its purpose; and the correctness of the plaintiff's legal theory -- his understanding of the statute on which he relies -- is a question that goes to the merits of the plaintiff's claim, not the plaintiff's standing to present it. Thus, during this threshold inquiry, "the question is whether the person whose standing is challenged is a proper [*5] party to request an adjudication of a particular issue. Federal Circuits routinely have approached standing as a question to be resolved prior to consideration of the merits of the case.

Grayson v. AT&T Corp., 15 A.3d 219, 229 (D.C. 2011) (citations omitted).

A question of subject matter jurisdiction falls under the rubric of a Super. Ct. Civ. R. 12(b)(1) analysis and "concerns the court's authority to adjudicate the type of controversy presented by the case under consideration." *Id. at 229 n.11*.

Distinguishing a Super. Ct. Civ. R. 12(b)(6) motion from a Super. Ct. Civ. R. 12(b)(1) motion, the Court of Appeals explained that

a court in deciding an issue on summary judgment must construe the facts in the light most favorable to the plaintiff and draw all reasonable inferences in her favor, (citation omitted), matters are different when, as in this case, the defendant has made a 'factual' attack on the court's subject matter jurisdiction supported by materials outside the face of the complaint. *See Heard, 810 A.2d at 878* ("The [church] Trustees' 12(b)(1) motion . . . was a 'factual' attack because . . . it 'challenged the existence of subject matter jurisdiction irrespective of the pleadings, and matters outside the pleadings . . . are considered.") (citations omitted). In such a

case 'plaintiff bears the burden of proof that jurisdiction does in fact [*6] exist,' *id.* (citation and quotation marks omitted), and 'no presumptions of truthfulness adhere to the allegation of the complaint.' *Id.*; see *Bible Way*, 680 A.2d at 426 n. 4 ('where the motion [to dismiss] concerns matters outside the complaint, it is a 'factual attack and the court is free to weigh the evidence without any presumptions regarding its truthfulness.').

Pardue v. The Center City Consortium Schools of the Archdiocese of Washington, Inc., et al., 875 A.2d 669, 675 (D.C. 2005). Furthermore, the court has advised that "a 'factual attack' under Rule 12(b)(1) may occur at any stage of the proceedings" *Heard, et al. v. Johnson*, 810 A.2d 871, 878 (D.C. 2002). However, the court cautioned that a jurisdictional attack differs from a Rule 12(b)(1) "'facial' attack on the allegation of jurisdiction in the complaint . . . [which] would require . . . [the court] to determine jurisdiction by looking only at the face of the complaint and taking the allegations in the complaint as true." *Id. at 877* (citation omitted).

III. ANALYSIS

It has been well-settled that "[i]f a claim belongs to the corporation, it is the corporation, acting through its board of directors, which must make the decision whether or not to assert the claim." *Grimes v. Donald*, 673 A.2d 1207, 1215 (D.C. 1996).

Pursuant to *D.C. Code* § 29-303.02, a corporation shall have the power to "[s]ue and be sued, and defend its corporate name." The Court of Appeals has interpreted the statute to mean that

"[t]he directors of a corporation and not [*7] its shareholders manage the business and affairs of the corporation." *Flocco v. State Farm Mut. Auto, Ins. Co.*, 752 A.2d 147, 151 (D.C. 2000) (quoting *Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991) (footnote omitted)); *D.C. Code* § 29-101.32(a) (2001) (formerly *D.C. Code* § 29-332 (a) (1981))¹ (providing that "[t]he business and affairs of a corporation shall be managed by a board of directors.") The management authority of corporate directors includes decisions to litigate on behalf of the corporation."

Behradrezaee v. Dashtara, 910 A.2d 349, 354 (D.C. 2006) (second alteration in original). "It is the corporate directors, not its shareholders, who have the authority to manage the corporation, including decisions to litigate on behalf of the corporation. (citations omitted)." *Estate of Raleigh v. Mitchell*, 947 A.2d 464, 469 (D.C. 2008).

1 The current statute, *D.C. Code* § 29-306.01, Requirement for and functions of board of directors, provides that

[a]ll corporate powers shall be exercised by or under the authority of the board of directors of the corporation and the activities and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under § 29-305.42.

In distinguishing a derivative action from a direct action by the corporation, the Court of Appeals remarked that

[t]he derivative form of action permits an individual shareholder to bring "suit [*8] to enforce a corporate cause of action against officers, directors, and third parties." (citations omitted). "[t]he purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interest of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'" (citations omitted).²

Behradrezaee, supra (citations and quotations omitted).

2 "In a derivative action, the shareholder seeks to assert, on behalf of the corporation, a claim belonging not to him but to the corporation." *Flocco, supra, at 151*.

Here, the individuals who brought this action in the name of the corporation had no authority. Their action did not constitute an action of the Board of Directors. Indeed, Defendants own 52% of the issued and outstanding shares of capital stock of the Shenandoah Cor-

poration. There is no record evidence that the Board of Directors brought the instant action. Having failed to show that the action was brought by the Board of Directors of the Shenandoah Corporation, this Court does not have subject matter jurisdiction and the case is dismissed pursuant to *D.C. Code* § 29.306.01(b) and § 29-303.02(1).

Although the Defendants focused their arguments on the issues of *res judicata* and [*9] to a lesser degree, personal jurisdiction, the threshold inquiry and issue for the Court to resolve was the issue of subject matter jurisdiction in accordance with the statutory and case law discussed above. Based on the record herein, the Shenandoah Corporation, the purported Plaintiff, did not bring this action. Instead, individual shareholders brought the action in the name "Shenandoah Corporation" without legal authority, i.e., the approval of the Board of Directors. Absent evidence that the Board of Directors, the only entity with authority to sue or be sued, approved the filing of the action, this case is dismissed, with prejudice.

IV. CONCLUSION

For the reasons stated above, the Motion is granted.

WHEREFORE, it is this 3rd day of February 2015, hereby,

ORDERED, that the Motion is **GRANTED**; and it is

FURTHER ORDERED, that Case No. 2014 CA 007767 B is **DISMISSED**; and it is

FURTHER ORDERED, that for each Motion filed, the parties shall e-mail a copy of the proposed order in Microsoft Word (.doc) format to the following e-mail addresses pursuant to this Court's General Order: Clarkjj2@dsc.gov and Clarkjj3@dsc.gov.

SO ORDERED.

/s/ Jeanette J. Clark

Judge Jeanette J. Clark

D.C. Superior Court [*10] Judge