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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000228-MR

LOWRY R. WATKINS, JR. AND
LOWRY R. WATKINS, JR., ON
BEHALF OF THE NORA IASIGI
BULLITT TRUST AND
BEARGRASS CORPORATION

APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NOS. 06-CI-002349 & 08-CI-002548

STOCK YARDS BANK & TRUST
CO.; E. GORDON MAYNARD; JOHN
S. OSBORN, JR.; BEARGRASS
CORPORATION; NORA IASIGI
BULLITT TRUST; F. LARKIN FORE,
IN HIS CAPACITY AS TRUSTEE OF
THE NORA IASIGI BULLITT TRUST;
NORA LEAKE CAMERON, AS
BENEFICIARY OF THE NORA IASIGI
BULLITT TRUST; NINA L.
RICHARDSON, AS BENEFICIARY
OF THE NORA IASIGI BULLITT
TRUST; NORA CHRISTIAN SKYE
CAMERON, AS BENEFICIARY OF
THE NORA IASIGI BULLITT TRUST;
RODERICK LEAKE CAMERON, AS
BENEFICIARY OF THE NORA IASIGI
BULLITT TRUST; SCOTT MACLEAN

RICHARDSON, AS BENEFICIARY OF
THE NORA IASIGI BULLITT TRUST;
BARBARA PORTER WATKINS, AS
BENEFICIARY OF THE NORA
IASIGI BULLITT TRUST;
D. TALMAGE HOCKER; HOCKER
PARTNERS I, INC.; HOCKER
OXMOOR, LLC; HOCKER OXMOOR
PARTNERS, LLC; AND DAVID
HOCKER & ASSOCIATES, INC.

APPELLEES

AND

NO. 2011-CA-000279-MR

JOHN S. OSBORN, JR.;
E. GORDON MAYNARD; AND
BEARGRASS CORPORATION

CROSS-APPELLANTS

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NOS. 06-CI-002349 & 08-CI-002548

LOWRY R. WATKINS, JR.

CROSS-APPELLEE

AND

NO. 2011-CA-000290-MR

STOCK YARDS BANK &
TRUST COMPANY

CROSS-APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NOS. 06-CI-002349 & 08-CI-002548

LOWRY R. WATKINS, JR.

CROSS-APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CLAYTON AND KELLER, JUDGES.

KELLER, JUDGE: Lowry R. Watkins (Watkins) appeals from an order of the Jefferson Circuit Court dismissing his individual claims against Stock Yards Bank & Trust Company (Stock Yards Bank). Watkins also appeals from an order of the Jefferson Circuit Court granting the Appellees' motions for summary judgment and dismissing his derivative claims against the Appellees. The Cross-Appellants, Stock Yards Bank, John S. Osborn, Jr. (Osborn), E. Gordon Maynard (Maynard), and Beargrass Corporation (Beargrass), cross-appeal from an order of the Jefferson Circuit Court denying their motions for attorneys' fees. For the following reasons, we affirm.

FACTS

This action revolves around the sale of the Oxmoor Center (Oxmoor), a shopping mall located in Louisville, Kentucky. Oxmoor was owned by Beargrass, a Kentucky corporation. From 1999 until 2003, the Hocker Appellees¹

¹ We note that Watkins filed suit against D. Talmage Hocker (Talmage), Hocker Oxmoor, LLC, Hocker Oxmoor Partners, LLC, Hocker Partners I, Inc., and David Hocker & Associates, Inc. For purposes of clarity, we refer to Talmage and all of these entities collectively as "the Hocker Appellees." However, we note the following distinctions. David Hocker & Associates, Inc. managed Oxmoor for Beargrass from 1999 until 2003. Talmage was President and CEO of David Hocker & Associates, Inc. On March 5, 2003, Hocker entered into a contract with Beargrass whereby he or his permitted assignee would purchase Oxmoor from Beargrass. In May 2003, Talmage created Hocker Oxmoor Partners, LLC, which in turn created Hocker Oxmoor, LLC to serve as the designated assignee of Talmage for the contract to purchase Oxmoor. Talmage also created Hocker Partners I, Inc. in May 2003 to serve as the manager of Hocker Oxmoor Partners, LLC and to effectuate the purchase of Oxmoor by Hocker Oxmoor,

managed Oxmoor. In 2003, Beargrass sold Oxmoor to the Hocker Appellees for \$72.4 million (the Sale) after the directors and shareholders of Beargrass unanimously approved the Sale. Seventeen months after the Sale, and without making any significant improvements, the Hocker Appellees resold Oxmoor for \$123 million.

The Beargrass shareholders consist of three family trusts: (1) the Thomas W. Bullitt Trust (the TWB Trust), holder of 54% of the shares; (2) the Nora Iasigi Bullitt Trust (the NIB Trust), holder of 40% of the shares; and (3) the Katherine E. Bullitt Revocable Trust (the KEB Trust). Stock Yards Bank acted as trustee of the TWB Trust. Watkins is one of the four living beneficiaries of the NIB Trust. At the time of the Sale, the Trustee of the NIB Trust was National City Bank of Kentucky (National City). In late 2004, National City was replaced as trustee of the NIB Trust by Larkin Fore (Fore).

According to an affidavit submitted by Fore, after he became trustee of the NIB Trust, Watkins asked him to investigate the price differential between the two sales of Oxmoor and demanded that Fore commence a shareholder derivative action. Fore conducted an investigation and consulted with the other beneficiaries of the NIB Trust. The other beneficiaries did not want to pursue any action. Based upon his investigation and the wishes of the other beneficiaries, Fore decided not to bring the shareholder derivative action sought by Watkins.

LLC. On May 9, 2003, Hocker Oxmoor, LLC purchased Oxmoor. Approximately seventeen months later, Talmage, Hocker Oxmoor, LLC, Hocker Oxmoor Partners, LLC, and Hocker Partners I, Inc. sold Oxmoor.

In March 2006, Watkins filed suit in the Jefferson Circuit Court in his individual capacity and derivatively on behalf of Beargrass (Case No. 06-CI-02349). Watkins alleged that Osborn, the Chairman of Beargrass; Maynard, the President of Beargrass; and Stock Yards Bank, the majority shareholder; breached their fiduciary duties to Beargrass, its shareholders, and the trust beneficiaries by recommending the sale of and selling Oxmoor for an inadequate price. To assure that all interested parties were before the trial court, Watkins joined Beargrass, the NIB Trust, Fore, and the beneficiaries of the NIB Trust as defendants. Watkins labeled those parties as “nominal defendants.” In his complaint, Watkins requested that the trial court direct Fore, as trustee of the NIB Trust, to prosecute the derivative claims for the benefit of all trust beneficiaries. After the lawsuit was filed, the shareholders of Beargrass, including Fore as trustee for the NIB Trust, unanimously authorized Beargrass to indemnify Osborn, its Chairman, and Maynard, its President, for any monetary liability they could incur from Watkins’s lawsuit.

The Appellees subsequently filed numerous motions to dismiss. In an order entered on May 29, 2007, the court denied Watkins’s request to force Fore to litigate the derivative claims, holding that Watkins could represent the interests of the NIB Trust. However, the court granted the Appellees’ motions to dismiss Watkins’s individual claims. In a subsequent order, the court dismissed Watkins’s claims against Osborn and Maynard in their individual capacities as directors, but refused to dismiss his claims against them as officers of Beargrass.

On March 5, 2008, Watkins filed a derivative action (Case No. 08-CI-02548) against the Hocker Appellees for the mismanagement of Oxmoor leading up to the Sale; for breach of fiduciary duties; and for aiding and abetting Osborn, Maynard, and Stock Yards Bank in breaching their fiduciary duties. By order dated November 12, 2008, that action was consolidated with Case No. 06-CI-02349.

All of the Appellees moved for summary judgment, and on March 31, 2010, the trial court held a hearing on those motions. On August 3, 2010, the court granted the Appellees' motions for summary judgment and dismissed all of Watkins's claims. Watkins appeals from this order and the May 29, 2007, order dismissing his individual claims.

Stock Yards Bank, Osborn, Maynard, and Beargrass subsequently filed motions for attorneys' fees, and the trial court denied those motions in an order entered on January 3, 2011. It is from this order that Stock Yards Bank, Osborn, Maynard, and Beargrass cross-appeal.

Additional facts will be set forth as necessary below.

STANDARDS OF REVIEW

The issues raised on appeal and cross-appeal have differing standards of review. Therefore, we set forth the appropriate standard of review as we address each issue.

ANALYSIS

1. Derivative Claims

On appeal, Watkins first argues that the trial court erred in granting the Appellees' motions for summary judgment and dismissing his derivative claims. Specifically, Watkins argues that: (1) the trial court erred in concluding that he did not have standing to pursue the derivative claims; (2) the trial court erred in concluding that no genuine issues of material fact existed with regard to his derivative claims against Osborn and Maynard; and (3) summary judgment was premature because the trial court denied him the opportunity to complete discovery. We disagree.

“The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.” *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

Summary judgment is only proper when “it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In *Steelvest*, the word “‘impossible’ is used in a practical sense, not in an absolute sense.” *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). In ruling on a motion for summary judgment, the court is required to construe the record “in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor.” *Steelvest, Inc.*, 807 S.W.2d at 480. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative

evidence in order to defeat a properly supported motion for summary judgment.

Id. at 481.

We believe that the trial court correctly granted the Appellees' motions for summary judgment because Watkins did not have standing to pursue the derivative claims. Kentucky Revised Statute (KRS) 271B.7-400(1) provides:

A person shall not commence a proceeding in the right of a domestic or foreign corporation unless he was a shareholder of the corporation when the transaction complained of occurred or unless he became a shareholder through transfer by operation of law from one who was a shareholder at that time. The derivative proceeding shall not be maintained if it appears that the person commencing the proceeding does not fairly and adequately represent the interests of the shareholders in enforcing the right of the corporation.

The question presented then is whether Watkins fairly and adequately represented the interests of the shareholders in this case. The Appellees bear the burden of proving that Watkins does not fairly and adequately represent the interests of the shareholders, and it is within the sound discretion of the trial court to determine if the Appellees met that burden. *Sahni v. Hock*, __S.W.3d__, 2007-CA-001785-MR (Ky. App. 2010) (citing *Owen v. Modern Diversified Industries, Inc.*, 643 F.2d 441, 443 (6th Cir. 1981)).

We note that the language of KRS 271B.7–400 is substantially the same as that found in Federal Rules of Civil Procedure (FRCP) 23.1. “As such, cases interpreting FRCP 23.1, while not binding on this Court, are both instructive and

persuasive on this issue.” *Bacigalupo v. Kohlhepp*, 240 S.W.3d 155, 156 (Ky. App. 2007).

In *Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 (6th Cir. 1980), the Sixth Circuit Court of Appeals identified several factors, which, if present, suggest that the derivative plaintiff is an inadequate representative:

[E]conomic antagonisms between representative and class; the remedy sought by plaintiff in the derivative action; indications that the named plaintiff was not the driving force behind the litigation; plaintiff’s unfamiliarity with the litigation; other litigation pending between the plaintiff and defendants; the relative magnitude of plaintiff’s personal interests as compared to his interest in the derivative action itself; plaintiff’s vindictiveness toward the defendants; and, finally, the degree of support plaintiff was receiving from the shareholders he purported to represent.

The *Davis* Court further stated that:

Typically, the elements are intertwined or interrelated, and it is frequently a combination of factors which leads a court to conclude that the plaintiff does not fulfill the requirements of 23.1 (although often a strong showing of one way in which the plaintiff’s interests are actually inimical to those he is supposed to represent fairly and adequately, will suffice in reaching such a conclusion).

Id. at 593.

Applying these factors, we conclude that Watkins’s self-interest and his lack of support from the other shareholders and the NIB Trust beneficiaries deprive him of standing. As correctly noted by the trial court, a month after Watkins filed this suit, Watkins’s counsel sent a letter to Fore and counsel for Osborn, Maynard, and

Stock Yards Bank, offering to dismiss all claims, including the derivative ones, in exchange for a payment of \$2.2 million to Watkins personally.

Watkins argues that the settlement letter was proper because it was a settlement of only his individual claims and that the parties knew the trial court would have to approve the settlement. However, we note that Watkins's settlement letter clearly states that he was willing to dismiss all claims, including the derivative ones, if he personally received \$2.2 million. We believe that Watkins's willingness to settle all claims at the expense of the shareholders and other beneficiaries reflects that his self-interests were in conflict with the interests of those he purports to represent.

Moreover, Watkins did not receive any support from the other shareholders of Beargrass. Specifically, all of the shareholders filed affidavits opposing Watkins's lawsuit, and they unanimously voted to indemnify Osborn and Maynard from any damages they may incur as a result of this action. Additionally, all of the beneficiaries of the NIB Trust, excluding Watkins, and the beneficiaries of the TWB Trust, which together represent 47,000 of the 50,000 outstanding shares of Beargrass,² filed affidavits expressing both their opposition to this lawsuit and their belief that Osborn, Maynard, and Stock Yards Bank all exercised "appropriate business judgment" in connection with the sale of Oxmoor. We believe that the averments in these affidavits sufficiently show that Watkins's interests are inimical to the other shareholders. *See Davis*, 619 F.2d at 593.

² The trial court's August 5, 2010, order notes that the beneficiaries of the KEB Trust did not express any opinion, one way or the other, regarding the derivative suit filed by Watkins.

Watkins argues that the fact he is the only person willing to pursue a derivative claim does not disqualify him from maintaining a derivative action. In support of this argument, Watkins cites to a number of cases, including *Angel Investors, LLC v. Garrity*, 216 P.3d 944, 950-51 (Utah 2009); *HER, Inc. v. Parenteau*, 770 N.E.2d 105, 112-13 (Ohio App. 2002); *Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 162-63 (Tex. 1990); *Brandon v. Brandon Const. Co. Inc.*, 776 S.W.2d 349, 352 (Ark. 1989); and *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177, 180 (N.D. Ill. 1987). However, in those cases, there were no other similarly situated shareholders. In this case, there are similarly situated shareholders, and Watkins is opposed by them all. Further, all of the beneficiaries of the NIB and TWB Trusts, except Watkins, oppose this action. Watkins has no support from any of the shareholders or beneficiaries he purports to represent. Accordingly, we conclude that Watkins does not fairly and adequately represent the interests of the shareholders as required by KRS 271B.7-400(1).

Finally, we note Watkins's argument that he had no opportunity to depose any of the shareholders or trust beneficiaries in order to inquire as to their motivations for objecting to his lawsuit. We fail to see how the motivations of the shareholders and beneficiaries for opposing Watkins's lawsuit change the fact that they oppose it.

As set forth above, Watkins does not fairly and adequately represent the interests of the shareholders. Therefore, he does not have standing to bring the

derivative claims. Accordingly, the trial court correctly granted summary judgment in favor of the Appellees and dismissed all of Watkins's claims.

Because Watkins did not have standing to bring the underlying derivative action, all other issues raised by Watkins as to his derivative claims are moot. Therefore, we do not address them.

2. Individual claims

On appeal, Watkins argues that the trial court erred by dismissing his direct claims against Stock Yards Bank. We disagree.

As set forth in *2815 Grand Realty Corp. v. Goose Creek Energy, Inc.*, 656 F. Supp. 2d 707, 715-16 (E.D. Ky. 2009):

[A] shareholder of a corporation does not have a personal or individual right of action for damages based solely on an injury to the corporation. A suit for damages arising from an injury to the corporation can only be brought by the corporation itself or by a shareholder derivatively if the corporation fails to act since only the corporation has an action for wrongs committed against it. There is, however, a well-recognized exception to this rule precluding shareholders from bringing individual actions. “[W]here the shareholder suffers an injury separate and distinct from that suffered by other shareholders,” or the corporation as an entity, the shareholder may maintain an individual action in his own right. A depreciation or diminution in the value of a shareholder's corporate stock is generally not recognized, however, as the type of direct, personal injury which is necessary to sustain a direct cause of action. The reasoning behind this rule is that a diminution in the value of corporate stock resulting from some depletion of or injury to corporate assets is a direct injury only to the corporation; it is merely an indirect or incidental injury to an individual shareholder.

(Citations omitted) (*quoting Gaff v. Federal Deposit Insurance Corp.*, 814 F.2d 311, 315 (6th Cir. 1987)).

In Watkins's amended complaint, Watkins alleged that Stock Yards Bank, as the majority shareholder and "advisor to the NIB Trust," breached its fiduciary duties it owed to Watkins, the NIB trust, and the other shareholders of Beargrass in connection with the sale of Oxmoor. It further provided that, "as a result of Stock Yard's failure to fulfill its fiduciary duties, [Watkins], the NIB Trust, Beargrass and the other legal and equitable shareholders of Beargrass have suffered considerable damage and drastic diminution in the value of their assets and stock."

We note that the violations of duties Watkins claimed Stock Yards Bank owed directly to him and the NIB Trust are the same duties he claimed Stock Yards Bank owed to the other shareholders of Beargrass. Moreover, Watkins failed to demonstrate a specific injury to himself outside the diminution in the value of the corporate assets and his stock. Therefore, we conclude that the trial court did not err in dismissing his direct claims. *See Sahni v. Hock*, __S.W.3d__, 2007-CA-001785-MR (Ky. App. 2010) (concluding that depreciation in the value of the shareholder's stock was not a sufficient type of direct personal injury necessary to sustain a direct cause of action).

3. Attorneys' Fees

The Cross-Appellants, Stock Yards Bank, Osborn, Maynard, and Beargrass, argue that the trial court erred by failing to award them attorneys' fees pursuant to KRS 271B.7-400(4). We disagree.

An award of attorney fees is within the sound discretion of the trial court, and its decision will not be disturbed absent a finding of abuse of discretion. *Ford v. Beasley*, 148 S.W.3d 808, 813 (Ky. App. 2004). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

KRS 271B.7-400(4) states in pertinent part:

On termination of the proceeding the court *may* require the plaintiff to pay any defendant’s reasonable expenses, including counsel fees, incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.”

(Emphasis added).

Although Watkins was unsuccessful, the facts surrounding the Sale and subsequent re-sale of Oxmoor gave him a reasonable basis to question the Sale. Thus, a finding by the trial court that Watkins did not commence the proceeding without reasonable cause is not an abuse of discretion. Furthermore, we note that, even if the court had determined that Watkins brought the proceeding without reasonable cause, the awarding of attorney fees is discretionary. Having reviewed the record, we cannot say that the court abused its discretion.

CONCLUSION

For the foregoing reasons, we affirm the orders of the Jefferson Circuit Court.

ALL CONCUR.

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