

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

NICOLE ANTAKLI,
Plaintiff,

v.

Case No. 13-135553-CB
Hon. James M. Alexander

JEHAD ANTAKLI, ET AL,
Defendants.

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' Joint Motion for Summary Disposition. Plaintiff is a minority shareholder and former President, COO, and Director of Defendant Intraco Corporation. The remaining Defendants are also Intraco shareholders and Plaintiff's mother, sister, and brothers. Plaintiff's Complaint alleges that the Defendant shareholders (the Family Control group) systematically oppressed Plaintiff, removed her as President and COO, reduced her compensation, and otherwise interfered with her interests as a shareholder.

In August 2013, Plaintiff then filed the present suit on claims of: (1) Shareholder Oppression; (2) Breach of Fiduciary Duty; (3) Tortious Interference with Prospective Business Relationship; and (4) Equitable Dissolution.

In Response, Defendants argue that Plaintiff is simply a disgruntled sibling who disagrees with Intraco's other members about management of the business. As a result, Defendants argue that this family dispute should be dismissed under MCR 2.116(C)(7), (C)(8), and (C)(10).

A motion under (C)(7) determines whether a claim is barred, among other grounds, by a

statute of limitations. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. And a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.

1. Shareholder Oppression – Count I

Defendants first claim that Plaintiff's Shareholder Oppression claim should be dismissed for two reasons: (1) it is barred by the two-year statute of limitations, and (2) all actions were authorized by Intraco's bylaws and Plaintiff failed to otherwise allege facts to support her claims.

a. Statute of Limitations

First, Defendants argue that Plaintiff's claim of Shareholder Oppression (Count I) is time-barred. Under MCL 450.1489(1)(f), "An action **seeking an award of damages** must be commenced within 3 years after the cause of action under this section has accrued, or **within 2 years after the shareholder discovers or reasonably should have discovered the cause of action** under this section, **whichever occurs first.**" (emphasis added).

In particular, Defendants cite to paragraphs 26 through 29 of Plaintiff's Complaint in support of their argument that some claims are time barred. In paragraph 26, Plaintiff alleges that, following a traumatic injury to her father, "the Family Control group began to make secretive plans to assert de facto control over Intraco in contravention of law and the applicable organizational structure for their own personal benefit and contrary to the best interest of Intraco and its shareholders."

In this regard, Plaintiff alleges that meetings were held on February 22 and March 3, 2011, where certain decisions were made. (Paragraphs 27, 28). In paragraph 29, in apparent reference to these meetings, Plaintiff alleges that "the Family Control group was clearly engaged in a systematic

pattern and practice of predicate acts intentionally designed to utilize Intraco for their own personal benefit.”

Defendants argue that, to the extent that Plaintiff seeks to use events that predate the Complaint by more than two years, the same are time barred. In her Response, Plaintiff concurs with this point. Instead, she clarifies that “[s]he only characterizes Defendants’ actions after August 8, 2011 as oppressive.”

Because all parties concur that any events that predate August 8, 2011 cannot serve as the basis for a shareholder oppression claim, the Court finds that summary of this claim under (C)(7) is not appropriate.

b. Actions authorized by bylaws.

Defendants next claim that Plaintiff cannot predicate her oppression claim on actions authorized by Intraco’s by-laws, and Plaintiff has otherwise failed to allege any facts demonstrating “willfully unfair and oppressive conduct.”

Under MCL 450.1489(1), in order to establish a shareholder oppression claim, a plaintiff must establish “that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.”

The statute defines “willfully unfair and oppressive conduct” as:

a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. **The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.** MCL 450.1489(3) (emphasis added).

Defendants argue that “Plaintiff’s allegations of shareholder oppression are based on her removal as President and COO of Intraco.” Because Intraco’s by-laws permit the removal and election of officers, however, Defendants argue that Plaintiff “has no viable shareholder oppression cause of action.”

Plaintiff responds that Defendants are oversimplifying her Complaint. Instead, Plaintiff argues that she alleged that the “Family Control Group is misusing their control of Intraco for their ‘personal use and benefit,’” and this allegation alone is sufficient to satisfy her pleading burden. Further, Plaintiff argues that “[t]he Family Control group marginalized and limited [Plaintiff’s] right to employment . . . , prohibited her from setting foot on Intraco’s business premises during office hours . . . , and taking other actions intended to disproportionately interfere with her interests as a shareholder.”

In support of her arguments, Plaintiff cites unpublished Court of Appeals opinions that hold such actions constitute “willfully unfair and oppressive conduct.” See *Berger v Katz*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2011 (Docket Nos. 291663, 293880); and *Madugula v Taub*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2012 (Docket No. 298426).

As the *Berger* panel reasoned, “[a]lthough the bylaws gave defendants the general authority to make business decisions such as setting salaries, issuing capital calls, or approving rental payments, that does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder.” The Court went on to conclude: “[t]he exception in MCL 450.1489(3) cannot be read as permitting willfully unfair and oppressive conduct under the guise of defendants’ general authority to run and manage [the business].”

The Court agrees with this reasoning. Defendants' argument appears to ignore Plaintiff's allegations that the otherwise authorized actions were done so in an oppressive way. In other words, Defendants cease their analysis at "Intraco's bylaws specifically permitted the Board of Directors to elect a new slate of officers." But Defendants' flawed argument ignores that they could not do so in a willfully unfair and oppressive manner – as Plaintiff's Complaint alleges.

For the foregoing reasons, considering only the pleadings and viewing all well-pled factual allegations in the light most favorable to Plaintiff, this Court cannot conclude that Plaintiff's claims for shareholder oppression are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade, supra*. As a result, summary disposition of this claim under MCR 2.116(C)(8) is DENIED.¹

In addition, viewing the evidence in the light most favorable to Plaintiff, the Court cannot conclude that there are no material questions of fact in dispute that entitles Defendants to judgment as a matter of law. Therefore, Defendants' request for summary under (C)(10) is also DENIED.

2. Breach of Fiduciary Duty – Count II

Defendants next argue that they are entitled to summary disposition of Plaintiff's breach of fiduciary duty claim because Plaintiff fails to allege that the individual Defendants breached any duty owed to Intraco – citing *Salvador v Connor*, 87 Mich App 664; 276 NW2d 458 (1978). The *Salvador* Court summarized that "in Michigan, directors and officers of corporations are fiduciaries who owe a strict duty of good faith **to the corporation** which they serve." *Id.* at 675. Defendants

¹ The Court also rejects Defendants' argument that Intraco is an improper party because an oppression claim must be brought only against the directors or those in control. As argued in Plaintiff's response, "[t]he inclusion of Intraco . . . is not based on any affirmative misconduct by . . . Intraco. [Rather,] [i]t is based on [Plaintiff's] prayer for dissolution, which is adverse to a corporation."

argue that Plaintiff's Complaint only alleges breaches to herself – a shareholder. Because Plaintiff fails to allege any breach of duty relating to Intraco, her claim must fail.

It appears that Defendants' argument is predicated on their belief that MCL 450.1541(a) is the only mechanism for Plaintiff's breach of fiduciary duty claim. But the case they cite – *Salvador* – recognizes a common law claim for breach of fiduciary duty owed from majority shareholders to other shareholders. In fact, in her Response, Plaintiff cites the next sentence of *Salvador*, which states:

The same is true of majority shareholders, since: **[The] law requires the majority in control of the corporation the utmost good faith in its control and management as to the minority** and it is the essence of this trust that it must be so managed so as to produce to each shareholder, the best possible return upon his investment. *Id.* at 675 (internal citations omitted) (emphasis added).

Further, Defendants' reliance on *Estes v Idea Eng'g & Fabricating, Inc*, 250 Mich App 270; 649 NW2d 84 (2002) to support their argument is flawed because *Estes* did not abrogate such a common law claim. This finding is bolstered by a post-*Estes* unpublished Court of Appeals opinion in *Dewitt v Sealtex Co*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket Nos. 273387, 273390, 274255, and 275931). In an opinion that noted the *Estes* decision, the *Dewitt* panel concluded that a common law breach of fiduciary duty claim was appropriate.

In their Reply, Defendants conclude that Plaintiff has not pled a valid claim, but they do not address the law cited in Plaintiff's Response – that a common law claim is appropriate. As a result, Defendants have failed to establish that the Court must summarily dismiss the same. For the foregoing reasons, Defendants' motion for summary disposition of Plaintiff's breach of fiduciary duty claim is DENIED.

3. Tortious Interference – Count III

Defendants next claim that Plaintiff's tortious interference claim fails as a matter of law because Defendants are not considered third parties – a requirement of such a claim. In support, Defendants cite *Dzierwa v Michigan Oil Co*, 152 Mich App 281; 393 NW2d 610 (1986) and *Feaheny v Caldwell*, 175 Mich App 291; 437 NW2d 358 (1989).

“To maintain a cause of action for tortious interference with a contract, a plaintiff must establish a breach of contract caused by the defendant, and that the defendant was a ‘third party’ to the contract or business relationship. *Dzierwa*, *supra* at 287. A plaintiff must also establish that “each defendant did per se wrongful acts or did lawful acts with malice and without justification.” *Feaheny*, *supra* at 305.

In *Dzierwa*, an employee sued his former employer following his termination – including, among others, a claim for tortious interference. The Court of Appeals, however, concluded that he could not pursue the tortious interference claim against the President of the company because the President was a controlling shareholder of the corporation and, therefore, could not be considered a third party.

In *Feaheny*, a former vice president of Ford sued top executives – claiming (in relevant part) that they tortuously interfered with his at-will employment contract when they limited his stock options, salary increases, and eventually terminated him. The *Feaheny* Court noted the difficulty in proving such a claim, reasoning:

since all five defendants were corporate officers, plaintiff faced the very difficult obstacle of showing that each defendant stood as a third party to the employment contract at the time he allegedly performed the acts. This is so, because, as corporate officers, the defendants served as agents whose acts were privileged when acting for and on behalf of the corporation, rather than acting to further strictly personal motives. *Feaheny*, *supra* at 305.

Ultimately, the *Feaheny* Court found that the plaintiff had not established the tortious interference claim because “Although the actions taken by defendants did amount to interference with his expectations under the at-will employment contract, their actions did not fit into the category of the wrongful interference that is required to maintain a tortious interference cause of action.”

Feaheny, supra at 307.

With respect to this claim, Plaintiff makes the following allegations:

48. Individual Defendants, in order to accomplish their improper and self-dealing purposes, intentionally disrupted or caused a disruption of these business relationships and expectancies between Plaintiff and Intraco.

49. Individual Defendants disrupted these business relationships and expectancies in order to solely promote their own personal benefit and not for any benefit to Intraco.

Considering only the pleadings and viewing all well-pled factual allegations in the light most favorable to Plaintiff, this Court concludes that Plaintiff’s allegations fall far short of the conduct necessary to establish a tortious interference claim. As a result, the Court finds that said claim is “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.”

As a result, summary disposition of the same is appropriate under MCR 2.116(C)(8).

In her Response, Plaintiff asks that the Court allow her an opportunity to amend her Complaint should the Court grant any portion of Defendants’ motion. MCR 2.116(I)(5) provides that, when deciding a (C)(8) or (C)(10) motion, “the Court **shall** give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” (emphasis added).

Despite its skepticism based on the pleadings so far, the Court will allow Plaintiff ten days to amend her Complaint to adequately plead this claim while conforming with MCR 2.114.

4. Equitable Dissolution – Count IV

Finally, Defendants claim that they are entitled to summary disposition of Plaintiff's equitable dissolution claim "because it is predicated on the same insufficient allegations of her prior counts." The Court, however, disagrees. As stated above, Plaintiff's claims for shareholder oppression and breach of fiduciary duty are adequately pled.

Further, to the extent that Defendants argue that dissolution is controlled by MCL 450.1823 – which Plaintiff cannot establish – and "Plaintiff has no right to an 'equitable' dissolution under common law," the Court rejects the same.

In her Response, Plaintiff cites *Levant v Kowal*, 350 Mich 232; 86 NW2d 336 (1957), which reasoned:

This jurisdiction, from an early time, has squarely aligned itself with those jurisdictions holding that a court of equity has inherent power to decree the dissolution of a corporation when a case for equitable relief is made out upon traditional equitable principles. It is the historic function of equity to give such relief as justice and good conscience require and the fact that a corporation is involved works no diminution of the chancellor's powers. *Levant, supra* at 241.

The *Estes* Court also noted, albeit in dicta, that there exists a common law claim for equitable dissolution, stating:

Section 489 and its predecessor section 825 were added to the Michigan statutes to give a statutory cause of action to shareholders who are abused by controlling persons. The claim under section 489 is direct, not derivative. **The statutory cause of action is, of course, similar to the common law shareholder equitable action for dissolution**, but is independent of that traditionally limited and uncertain cause of action. *Estes, supra* at 284 (emphasis added).

Based on the foregoing authority, the Court cannot conclude that Plaintiff's equitable dissolution claim fails as a matter of law. Therefore, Defendants' motion for summary of the same is DENIED.

Summary

To summarize, Defendants' Motion for Summary Disposition is GRANTED with respect to Plaintiff's claim for tortious interference (Count III) as it presently exists. But Plaintiff may amend her Complaint to adequately plead a claim for the same within 10 days. MCR 2.116(I)(5).

In all other respects, Defendants' motion is DENIED.

IT IS SO ORDERED.

January 22, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge