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Waukesha County
2018CV000691

BY THE COURT:

DATE SIGNED: April 24, 2020

Electronically signed by William J. Domina
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT CIVIL DIVISION WAUKESHA COUNTY

Estate of Stephen O'Bryan et al
Plaintiffs,

CASE NO. 18 CV 691

vs.

David L O'Bryan et al
Defendants.

DECISION AND ORDER

Stipulated Findings of Fact:

1. Leslie ("L.L.") O'Bryan and his wife, Faye O'Bryan, were the patriarch and matriarch of the O'Bryan family.

2. L.L. and Faye had eight children, including Defendant William O'Bryan and Plaintiffs Michael "Mickey" O'Bryan, Joan O'Bryan Herriott, Susan O'Bryan, Kathy Brucks, and Stephen "Buddy" O'Bryan, deceased, whose Estate is a Plaintiff. (Another of L.L. and Faye's children, Tom O'Bryan, is deceased. Patrick O'Bryan, another child, is still living but is not a party to the lawsuit.)

3. The other Plaintiffs and the other four Defendants are grandchildren of L.L. and Faye O'Bryan.

4. In the 1930s, L.L. and Faye O'Bryan purchased a large farm that is partially in Waukesha and partially in Walworth Counties.

5. The property includes a large residence, along with other long-term rental houses, crop land, pasture, woods, many barns and out buildings and a lake.

6. While L.L. was alive, the property was a working farm that raised cattle.

7. In 1970, L.L. O'Bryan died.

8. Lakewood Farms, Inc. ("LFI") was incorporated in 1973 by Faye O'Bryan under Wis. Stat. Ch. 180.

9. In 1973, Faye began gifting shares to her eight children, retaining a number of shares for herself.

10. Each child signed a Restrictive Stock Agreement.

11. The Plaintiffs are all shareholders or preferred stock certificate holders of LFI.

12. The Individual Defendants are presently the officers and directors of LFI, and have all been officers and/or directors since at least August 22, 2016.

13. LFI's primary asset is the real estate located in Waukesha and Walworth Counties.

14. The property has been used by many family members for family retreats and vacations.

15. When LFI was incorporated, it held approximately 2,400 acres of farmland and wetlands which had been used in part by L.L. as a cattle ranch. The cattle were sold at or around the time of incorporation, and the proceeds of that sale did not go to LFI. LFI's property has not been used as a cattle ranch since.

16. In January 1980, the corporation was recapitalized and there was an exchange of common stock for preferred stock.

17. Between the recapitalization in January 1980 and August 22, 2016, there were 3,200 common shares and 25,200 preferred shares of LFI outstanding. All shares had equal voting rights.

18. In 1990, a Voting Trust was created to vote the preferred shares in the corporation, and the votes of all 25,200 shares in the trust were to be decided by a majority vote of trustees.

19. Faye gifted Voting Trust certificates to her children and grandchildren.

20. Prior to August 22, 2016, no shareholder had paid anything either to Faye or LFI for any of their shares.

21. Prior to August 22, 2016, no shareholder had made any monetary investment in LFI.

22. The Articles of Incorporation authorized the issuance of up to 50,000 common shares.

23. The original five voting trustees were five of Faye O'Bryan's children: Kathy Brucks, Susan O'Bryan, Stephen "Buddy" O'Bryan, Michael O'Bryan, and Joan O'Bryan Herriott.

24. From 1973 to 2010, LFI sold approximately half of its acreage, primarily to pay off loans and fund operating expenses. By 2010, it had approximately 1,200 noncontiguous acres left. LFI has not sold additional acreage since 2010.

25. In 2010, LFI received a letter from the Wisconsin Department of Natural Resources ("DNR") expressing interest in purchasing most of LFI's real estate (except a noncontiguous parcel) for $10,180,000.

26. Although LFI's Board of Directors voted to accept the DNR offer, when the matter was put to a shareholder vote, three of the then-current voting trustees, Stephen O'Bryan, Michael O'Bryan, and Joan O'Bryan Herriott, voted against the transaction. As a result, the voting trust voted its shares against the transaction, and the motion failed.

27. Stephen O'Bryan subsequently purchased the common shares of Susan O'Bryan and Kathy Brucks, and both resigned their positions as voting trustees. They were replaced by successor trustees.

28. In 2010, a new board of directors and officers were elected, and in 2012 they adopted a mission statement for LFI.

29. The Board of Directors at the time the mission statement was adopted included Plaintiffs Michael O'Bryan and Joan O'Bryan Herriott and also Stephen "Buddy" O'Bryan.2

30. The corporate mission statement has never been changed.

31. From 2015 to August 22, 2016, the officers and directors of LFI were Michael O'Bryan ("Michael"), President and Director, and the Individual Defendants: his son David O'Bryan ("David"), Vice President and Director; William O'Bryan ("Bill"), Director; Thomas O'Bryan, Jr. ("Tommy") Director; Robert M. O'Bryan ("Robert"), Director, and Deborah O'Bryan Alm ("Debbie"), Secretary.

32. LFI's net income for the years 2009 through 2017 was as follows:
a. 2009: -14,961.16
b. 2010: -4,324.36
c. 2011: -1,114.30
d. 2012: 170.64
e. 2013: 7,823.60
f. 2014: -8,329.27
g. 2015: -120.93

Additional Findings of Fact:

1. This litigation really begin 2016 in an action filed by a smaller group of the current plaintiffs against the same defendants in Waukesha County Case No. 16-CV-1607, then assigned to the Honorable Kathryn Foster. The claims included counts for alleged breach of "fiduciary duty of care, and loyalty against director defendants", declaratory judgment voiding issuance of stock shares issued to the defendants, and a demand for temporary restraining order. Ultimately, Judge Foster granted the defendants' motion for summary judgment on the claim for alleged breach of "fiduciary duty", etc. because, Judge Foster found that this claim was "**derivative in nature but has been pled as a direct claim**." See, Foster Order entered on

02/26/2018 in 16-CV-1607 (Emphasis Added). Under Wisconsin law, if the primary injury arising form a defendant' conduct is to the corporation and not the shareholder, the claim belongs to the corporation and the shareholder cannot maintain a direct action. Rose v. Schantz, 56 Wis. 2d 222, 229-30, 201 N.W.2d 593, 598 (1972).

2. No appeal from this earlier case was taken. Rather the original plaintiffs along with other LFI shareholders filed this action. The complaint bears the bolded title "**Shareholder Derivative Complaint**" and alleges claims for "Breach of Fiduciary Duty," "Unjust Enrichment," and "Gross Mismanagement". [1]

3. The defendants answer to the derivative complaint denies the plaintiffs' stated grounds for recovery and brings counterclaims for the removal of Michael, Joan, and Brendan Tim O'Bryan as trustees of the voting trust established for LFI, and for contribution/indemnification from the same plaintiffs if the defendants are personally found liable. Additionally, the defendants raise eleven separate affirmative defenses including the ninth affirmative defense stating "[p]laintiffs have asserted in this action what they

[1] At trial, the kinds of conduct the plaintiffs' complain of include revenue generating decisions, alleged personal use of corporate property and establishment of board member salaries which appeared contemporaneous with stock modifications. Some of this conduct may be subject to the "business judgment rule" limiting liability. The business judgment rule is "a judicially created doctrine that limits judicial review of corporate decision-making when corporate directors make business decisions on an informed basis, in good faith and in the honest belief that the action taken is in the best interests of the company." Einhorn v. Culea, , 235 Wis. 2d 646, ¶19, 612 N.W.2d 78 (2000). The rule "immunizes individual directors from liability and protects the board's action from undue scrutiny by the courts." Data Key Partners v. Permira Advisers LLC, 356 Wis. 2d 665, ¶ 32, 849 N.W.2d 693 (2014). The rule is in place to limit court involvement in business decisions in which the court may not have much or any expertise. Reget v. Paige, 242 Wis. 2d 278, , ¶17, 626 N.W.2d 302 (2001) Procedurally, the business judgment rule creates an evidentiary presumption that the acts of the board of directors were done in good faith and in the honest belief that its decisions were in the best interest of the company. Id. at ¶¶ 17-18. Four elements generally define the business judgment rule presumption: (1) a business decision; (2) disinterestedness and independence; (3) due care; and (4) good faith. See Roselink Investors, LLC v. Shenkman, 386 F. Supp. 2d 209, 216 (S.D.N.Y. 2004); Aronson v. Lewis, 473 A.2d 805, 811-16 (Del. 1984). Thus, this rule does have limits. See generally, Zastrow v. Journal Communications, Inc., 291 Wis. 2d 426, ¶¶ 24-40, 718 N.W.2d 51 (2006); Jorgensen v. Water Works, Inc., 218 Wis.2d 761, 776-77, 582 N.W.2d 98 (Ct. App. 1998)(An officer's or director's unauthorized payments to himself or herself, or the payment of constructive dividends to some shareholders, but not others, or the payment of disproportionate dividends, generally, is a breach of fiduciary duty. The breaching officer or director is liable to the corporation when the injury is principally suffered by the corporation, or to the shareholders if the injury is primarily to the individual shareholders). Because of the Court's conclusion regarding Section 180.0742, Wis.Stats. in this case, the Court has not measured the facts established at trial under the business judgment rule.

characterize as a derivative claim but have failed to satisfy the requirement for such a claim pursuant to Wis. Stat. § 180.0742.

4. No dispositive motion was filed by any party to this action

5. The matter was tried to the Court over three days, August 20-22, 2019. The parties were directed to submit post-trial briefing and proposed findings of fact and conclusions of law. The matter is now ready for decision.

DISCUSSION

As noted, the plaintiffs have brought their claims as a derivative action. In a derivative action, a shareholder stands in the shoes of the corporation, Link v. Link, 2020 WI App 1, par. 65 (Ct. App. 2019)(unpublished), because the corporation's assets are affected, Park Bank v. Westburg, 348 Wis.2d 409, ¶ 41 832 N.W.2d 539, ¶ 41 (2013).

As an initial and possibly dispositive defense to the plaintiffs' claims, the Court must address the ninth affirmative defense based upon Wis. Stat. § 180.0742. This statute provides that:

> **180.0742 Demand.** No shareholder or beneficial owner may commence a derivative proceeding until all of the following occur:
>
> **(1)** A written demand is made upon the corporation to take suitable action.
>
> **(2)** Ninety days expire from the date on which the demand was made, unless the shareholder or beneficial owner is notified before the expiration of 90 days that the corporation has rejected the demand or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

Wisconsin shareholder derivative actions are actions in equity. Read v. Read, 205 Wis.2d 558, 563, 556 N.W.2d 768, 770 (Ct. App. 1996). By 1991 Wis. Act 16, the Wisconsin Legislature repealed and recreated this statute to its current form. In so doing, the Legislature embraced a stricter statute that mandates, without exception, that an aggrieved shareholder demand that the corporation file suit. As this same language has been uniformly adopted in other states and held to be an absolute prerequisite to the commencement of a derivative action, see, e.g. Speetjens v. Malaco, Inc., 929 So.

2d 303 (Miss. 2006), this Court looks to case law from Wisconsin and other states in order to assess whether the plaintiffs in this case have complied with this absolute prerequisite to suit.

The sufficiency of a written demand raises a question of fact to be determined by the trial court. See. McCann v. McCann, 61 P.3d 585 (Idaho, 2002). The demand must be made upon the directors in office at the time that the shareholders derivative action is commence and, although "[t]he demand on the directors need not assume a particular form nor need it be made in any special language,…the shareholder must make an earnest and sincere, and not feigned or simulated, effort to induce the directors to take remedial action in the corporate name." Id. Although derivative actions are equitable matters, there has been a general trend towards narrowing, if not eliminating, the exceptions from the demand requirement. See. Boland v. Engle, 113 F. 3d 706 (7th Cir. 1997). At the time of the Boland decision, the United States Court of Appeals for the Seventh Circuit observed that eleven states, including Wisconsin, had statutorily imposed a universal demand requirement and that both the case law and academic commentary were moving strongly in that direction. Id.

> Requiring demand…serves as a valuable screen of potential lawsuits, both by giving corporations a crack at resolving shareholder complaints before litigation and by giving courts more information on which to decide the merits of those suits that remain after demand.

Id.

The defendants have leveled complaint at what they deem is an inadequate demand made by the plaintiffs before commencing this derivative action. This same issue arose at the close of the plaintiffs' case when the defendants moved for dismissal. At that the time, the plaintiffs responded:

> First on the demand issue we think the record establishes that them February 18th, 2016, letter was a demand in conformance with the statute and everything that came after it was admitted by David O'Bryan to have come out of the response to that letter. It would be I think inappropriate to require a further demand for actions taken

> to thwart the initial demand. Further we would argue that the demand would be futile based on the actions of the board of directors.

Tr. Trans. Day 2, p. 221. In the briefs filed after trial, the plaintiffs also referred to the filing of the prior shareholder direct action filed on August 31, 2016 in Waukesha County case 16-CV-1607 as meeting the "demand" requirement. Plaintiffs' Reply filed 12/06/2019 at. p. 4-7.

First, the Court reviews the language adopted by the Wisconsin Legislature in 1997 which forms Section 180.0742, Wis. Stats. to determine whether a futility exception is present. The Court finds none. Make no mistake, this statute does contain unambiguous exceptions to the demand requirements where (a) the complaining shareholder has already been notified that the demand they would otherwise be required to make has already been rejected by the corporation or (b) irreparable injury would result by requiring a demand and a 90-day delay before litigation may commence. The defendants refer the Court to two cases in support of their argument that a futility exception should be read into this statute:

> Wisconsin recognized the requirement at least as early as *Northern Trust Co. v. Snyder*, 89 N.W. 460, 113 Wis. 516 (1902), and again in *Whitcomb v. Albany Hardware Specialty Mfg. Co.*, 245 Wis. 86, 88, 13 N.W.2d 516, 517 (1944). Both cases recognize demand futility not on any statutory basis, but on equitable principles.

Plaintiffs' Reply to Defendants' Opening Brief filed 12/06/2019 at p. 7. The defendants go further to claim that there must be "clear evidence" that the Legislature intended to abrogate previously recognized equitable principles before a Court may conclude that a statutory change did just that. Id.[2] However, it is a fundamental rule of statutory construction that where a statue is clear and

[2] In their Reply Brief at p. 6 the plaintiffs argue that "[d]efendants do not cite any Wisconsin case discussing whether an exception for demand futility remains, and [p]laintiffs do not believe any Wisconsin court has considered the question." This assertion is compound and contains portions that are true and portions that are, at best, incomplete and, at worst, misleading. It is true that the defendants do not cite to any controlling Wisconsin authority on the demand futility issue. However, the plaintiff's statement would have been more complete if it concluded that no Wisconsin court has considered this question in a published or citable unpublished opinion. The plaintiffs' belief notwithstanding, it goes too far to state that "no Wisconsin court has considered this question." In an unpublished decision, Schroeder v.

unambiguous, no further statutory construction is necessary and the statute will be given its plain meaning under Wisconsin law. See. Wis. Bell, Inc. v. PSC, 277 Wis. 2d 729, 734, 691 N.W.2d 697, 698 (Ct. App. 2004) (When interpreting a statute, appellate courts first look to the plain meaning of the statute. When the statutory language is clear and unambiguous, courts may not look beyond the plain words of the statute in question to ascertain its meaning). Given the clear and unambiguous language of Section 180.0742 which includes only two clear exceptions to the demand requirement and does not include a futility exception, this Court concludes that no futility exception to the demand requirement exists under Wisconsin law and the Court must analyze whether the plaintiffs met this requirement in this case.

The written correspondence dated February 18, 2016 has been offered by the plaintiff as meeting the demand requirements of Section 180.0742, Wis. Stats.. This correspondence was written on behalf of two individual shareholders in 2016, Joan Herriott and Stephen "Buddy" O'Brien by a legal representative. Only Ms. Herriott joins as an individual plaintiff in the instant suit.[3] Moreover, the correspondence was directed to then-board members, Michael L. O'Bryan, William L. O'Bryan, Robert M. O'Bryan, David O'Bryan and Thomas R. O'Bryan, Jr.. A copy of this "demand" was apparently sent to the other corporate shareholders. The correspondence contains some "demand-like" language when it states:

Equitable Bank, Case No. 97-2960, 1998 Wisc. App. LEXIS 981, 222 Wis. 2d 218, 587 N.W.2d 214 (Ct. App, Dist. II, 1998), a Wisconsin court considered the exact issue of demand futility under Section 180.0742, Wis. Stats. This Court includes citation to this case not for any precedential or persuasive value but to rebut a statement that the Court found offensive.

[3] Stephen "Buddy' O'Brien passed away after the issuance of the February 18, 2016 correspondence. Stephen's estate has been joined as a plaintiff but this entity may have some differing interests that of the individual given the obligations to the estate beneficiaries and other fiduciary obligations. The Court simply notes this potential, however, and given the other conclusions reached in this case, the Court does not pursue a full analysis of whether an estate may "stand-in" for an individual making a demand upon a corporate entity when bringing a derivative action lawsuit.

> [W]e request that you pursue a sale of the Company (or, alternatively the land it owns) and distribute the proceeds as well as any other corporate assets to the shareholders.

However, language of the letter softens in demand by stating:

> Of course, any buyout must be for a fair price….Please let us know whether you will explore selling the farm. Please provide a report from the broker you retain identifying efforts to market the property and any offers…We would appreciate hearing from you by March 4, 2016.

The Court makes that following findings regarding this demand that result in its disqualification from meeting the demand requirements under Section 180.0742, Wis. Stats.. The very purpose of the demand requirement in a derivative action is to identify an injury to or claim of the corporation and to "demand" that such injury or claim be remedied through "suitable action." At most, the injury or claim complained about related to the shareholder value of certain individual shareholders, not the corporation. Additionally, it appears that the February 18, 2016 correspondence fell short of "demanding" suitable action as it softened to merely request that then-existing board members merely "explore selling the farm" and "provide a report…identifying efforts to market the property." The Court concludes that the shareholders upon whose behalf the February 18, 2016 correspondence was written didn't want the corporation or its assets sold for "maximum" value, but rather, they wanted to see what the "achievable" value was before deciding to further demand that the corporation or its assets be sold. Thus, they fell short in demanding the kind of remedial action contemplated by the statute. The February 18, 2016 letter also set a deadline well short of the 90-day time limit contemplated by Section 180.0742, Wis. Stats. (February 18 to March 4, 2016 is a mere 15 days). See. Jorgensen v. Water Works, Inc., 218 Wis. 2d 761, 787-788, 582 N.W.2d 98, 109 (Ct. App. 1998)(A response time less than the statutory minimum set forth in a purported "demand" is "in and of itself…an indication that [it is not a demand] within the meaning of Section 180.0742, Wis. Stats.").

Another fatal flaw to the ability of the February 18, 2016 correspondence from being able to serve as an adequate demand under Section 180.0742, Wis. Stats., and thus serve as a prerequisite to the second lawsuit filed in 2018, is to whom the correspondence is directed. It was not directed to the corporation or the board members that existed at the time of this litigation. It appears to be well-settled that a qualifying demand can only be made upon the board members in office at the time that the derivative action is commenced. See. McCann, 61 P.3d at p.591. There is no dispute that the instant matter was commenced in April of 2018. However, there were changes in the board of directors which occurred after the February 18, 2016 correspondence was sent. The testimony at trial indicated that in November of 2016, the board was reconstituted. Tr. Tran. Day 3, p. 183. Therefore, even assuming the correspondence of February 18, 2016 was a sufficient demand under Section 180.0742, Wis. Stats., it expired as a sufficient demand that moment that the board was reconstituted and well-before this action was commenced. In Jorgensen v. Water Works, Inc, supra, the Wisconsin Court of Appeals found a failure of demand where correspondence was not address to the corporation but only to majority shareholders. Here, the alleged demand letter is directed to neither the corporation nor the board members in control at the time of litigation.

Lastly, the plaintiff points to its earlier attempt to bring a direct action in Waukesha County case 16-CV-1607 two years prior to this litigation as qualifying as a demand under Section 180.0742, Wis. Stats.. First, the Court notes that this earlier litigation was filed on August 31, 2016, prior to the reconstitution of the Board in November of 2016. Thus, for the reasons discussed above, this would make this "demand" as untimely on the board that was reconstituted in November of 2016. Moreover, the Court has already discussed that the very purpose of the demand requirement is to give the corporation is to serve as a screen limiting potential lawsuits. Consequently, it would be incongruous with this purpose to allow a lawsuit to serve a notice

meeting the demand requirement under Section 180.0742, Wis. Stats. when the very purpose of this requirement is to limit or avoid litigation. For these reasons, the Court concludes that the direct action litigation commenced in August of 2016 does not meet the demand requirement under Section 180.0742, Wis. Stats..

The plaintiff's counter this demand issue by arguing, in the alternative, that the Court "should nonetheless conform the pleadings to the proof and recast the case as a cause of action for dissolution on the grounds of shareholder oppression" under Section 180.1430, Wis. Stats.. In effect, this argument is a request to amend pleading to conform to the evidence, after the close of evidence. See. Section 809.09, Wis. Stats.. This request is directed to the discretion of the Court and may be granted absent prejudice to any party. See. Schultz v. Trascher, 249 Wis. 2d 722, 640 N.W.2d 130 (Ct. App 2002). A remedy available as part of a corporate dissolution is the appointment of a receiver, which the plaintiffs' also now request despite not including this in their original pleadings. Although the appointment of a receiver may have been supported if there were clear evidence that LFI was without any capacity to generate a return or provide value to its shareholders[4], the record was not clearly established on this issue. Further, the plaintiffs' request to now convert this matter of a full corporate dissolution when never included in the plaintiffs' analysis even at trial strikes the Court as a course of action would be fundamentally unfair to the defendants and their right to know what they are defending against. Therefore, the Court rejects the request by the plaintiffs to exercise its discretion to allow these amendments after the evidence has been closed.

[4] During trial, the Court did make inquiry as to whether LFI was a "going concern" in light of the evidence which indicated that a substantial loan was made to LFI which appeared to be largely dissipated into LFI operations. However, the record was not clear whether the expenses bourn by LFI resulted by a lack of income-generating potential or were directly related to the legal expenses cause bourn by LFI as a result of the plaintiffs' claims brought in this or prior cases. This is precisely why the Court cannot accept the plaintiffs' tardy request for appointment of a receiver at this time.

Based upon the foregoing, the Court enters the following:

ORDER

IT IS HEREBY ORDERED that the claims brought by the plaintiffs in the derivative action are hereby DISMISSED; and,

IT IS FURTHER ORDERED that as the defendants are not found personally liable by the Court, the defendants' claims for contribution and/or indemnification are hereby DISMISSED; and,

IT IS FURTHER ORDERED that the request by the defendants that Michael O'Bryan, John O'Bryan Herriott and Brendan Tim O'Bryan be removed as trustees of the Voting Trust is DENIED.[5]

[5] It appears that the defendants have abandoned the request to remove the noted individuals as trustees from the Voting Trust as this "counterclaim" was not included in post-trial brief arguments presented to the Court. Regardless, the Court does not accept the apparent claim that such individuals should be removed because they advocated for a different corporate direction than was reflected in LFI's "mission statement." Freedom of speech is fully available under our Constitutional protections---even to majority and minority shareholders in American corporations.