COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0685 **Cir. Ct. No. 02CV001449**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

DISCOVERY TECHNOLOGIES, INC.,
MARKETSENSE, INC., AND
JOHN FLECKENSTEIN,

PLAINTIFFS-APPELLANTS,

V.

AVIDCARE CORPORATION,

DEFENDANT,

BOAZ AVITALL,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. Discovery Technologies, Inc., Marketsense, Inc., and John Fleckenstein appeal from a judgment entered after the trial court denied Discovery's motion seeking reconsideration and granted Boaz Avitall's motion to dismiss. Discovery makes two claims. First, it asserts the trial court erred in ruling that the complaint was insufficient to provide notice to Dr. Avitall that he was being sued personally under a piercing the corporate veil theory. Second, it contends the trial court erroneously exercised its discretion when it denied Discovery's motion to amend the complaint. Because we conclude that the trial court did not err, we affirm.[1]

BACKGROUND

¶2 Discovery Technologies, Marketsense, Inc., and John Fleckenstein were creditors of AvidCare Corporation. On February 8, 2002, Discovery, Marketsense and Fleckenstein (hereinafter collectively "Discovery") filed a summons and complaint naming AvidCare and Avitall as defendants. The complaint alleged:

> 1. That at the times hereinafter mentioned the plaintiff, Discovery Technologies, Incorporated, is a Wisconsin corporation, having its principal place of business located at 10437 Innovation Drive, Suite 303, Milwaukee, Wisconsin 53226.

[1] Avitall raised a question as to whether this court had jurisdiction to hear this appeal because Discovery did not appeal from Judge Michael P. Sullivan's July 11, 2003 letter/order denying the motion to amend the complaint, but rather, appealed only after Judge Lee E. Wells's order denied Discovery's motion seeking reconsideration. The record reflects that Judge Sullivan's order addressed solely the issue relating to amendment of the complaint and did not address dismissal of the complaint for insufficient pleadings. Accordingly, we conclude that there was no order to appeal from until Judge Wells's order. Thus, we reject Avitall's challenge to the jurisdiction of this court.

2. That at all times hereinafter mentioned the plaintiff, Marketsense, Inc., is a Wisconsin corporation, having its principal place of business located at 11116 80th Street, Pleasant Prairie, Wisconsin 53258.

3. That at all times hereinafter mentioned the plaintiff, John Fleckenstein, is an adult resident of the State of Wisconsin, residing at 4600 Three Meadows Drive, Brookfield, Wisconsin.

4. That, upon information and belief, the defendant, AvidCare Corporation ("AvidCare"), is a Wisconsin corporation, having its principal place of business located at 152 West Wisconsin Avenue, Suite 930, Milwaukee, Wisconsin 53203.

5. That, upon information and belief, the defendant, Boaz Avitall ("Avitall"), is an adult resident of the State of Wisconsin, residing at 4868 North Ardmor Avenue, Whitefish Bay, Wisconsin.

6. That the plaintiff, Discovery Technologies Incorporated, has a provable claim against defendant, AvidCare, in the sum of $57,834.66, as of February 8, 2002.

7. That the plaintiff, Market[s]ense, Inc., has a provable claim against defendant, AvidCare, in the sum of $69,019.54, as of February 8, 2002.

8. That the plaintiff, John Fleckenstein, has a provable claim against defendant, AvidCare, in the sum of $20,600.00, as of May 8, 2001.

9. That the question which is the subject of this action is one of common and general interest to all creditors of AvidCare. That the creditors are numerous, and the names of some of them are unknown to plaintiff. That it is impracticable to bring them all before this Court.

10. On information and belief, AvidCare transferred its Series 1000 System ("Series 1000"), including the Series 1000 Software, to Avitall within the past four months for the purpose of hindering and delaying the creditors of AvidCare from applying its assets to its debts.

11. On information and belief, Avitall obtained the Series 1000 from AvidCare for less than adequate

> consideration for the purpose of hindering and delaying AvidCare's creditors.
>
> [12]. As a matter of law, Plaintiffs are entitled to pierce AvidCare's corporate veil or treat AvidCare as the alter ego of Avitall.
>
> [13]. Upon information and belief, AvidCare is insolvent or is in imminent danger of insolvency.
>
> WHEREFORE, plaintiff prays that the Court sequestrate the property and assets of AvidCare and the Series 1000 from Avitall and appoint a receiver over AvidCare for the administration of the assets of AvidCare in accordance with Chapter 128 of the Wisconsin Statutes.

¶3 Two weeks later, the parties stipulated that AvidCare and Avitall would be temporarily restrained from disposing of any of AvidCare's assets. The stipulation did not prohibit AvidCare or Avitall from making any payments necessary to keep AvidCare operating with respect to ongoing patients/customers. AvidCare and Avitall represented to the court that the sale of AvidCare was imminent and requested that the court delay in appointing a receiver so that the sale could be completed.

¶4 On June 1, 2002, AvidCare had still not been sold. As a result, the trial court entered an order stating that a receiver "shall be appointed on June 10, 2002." The order required that AvidCare and Avitall cooperate with the appointed receiver and prohibited Avitall from disposing of any interest he had in the Series 1000 system, its software and any other assets obtained from AvidCare. The court appointed Attorney Michael Polsky as receiver over the assets of AvidCare. Polsky sent out notices to all creditors.

¶5 On November 15, 2002, Discovery's attorney sent a letter to Polsky requesting that he obtain the documents, which Discovery was enjoined from

obtaining. On November 27, 2002, the court ordered Avitall to provide Discovery's attorney and Polsky with an itemized list of all personal property and other assets owned by AvidCare.

¶6 On March 9, 2003, Avitall finally complied with the order. His disclosure, however, did not indicate any ownership interest in the Series 1000. On May 14, 2003, Polsky moved the court for an order authorizing him to sell the assets of AvidCare. The receiver approached the appellants in this case first and offered them the opportunity to purchase the assets of AvidCare for the cost of administration. The appellants offered to pay $2500, which was significantly below administrative costs. The receiver rejected this offer.

¶7 Polsky then approached Avitall and made the same offer. Avitall accepted and paid approximately $10,000 to purchase all remaining assets of AvidCare. On June 9, 2003, the trial court entered an order granting Polsky's motion seeking to sell AvidCare's assets to Avitall and entered an order discharging Polsky on June 24, 2003.

¶8 At this June 9th hearing, the parties argued about whether Avitall should be dismissed from the complaint due to the discharge of the receiver. Avitall contended that the complaint failed to allege any factual basis to hold him personally liable for AvidCare's debts. Discovery then moved the court for the opportunity to amend their complaint to add specific factual allegations against Avitall personally. The trial court took the motion under advisement.

¶9 On July 11, 2003, the trial court issued a letter decision denying Discovery's request to amend the complaint:

> … because that amendment, coming as it would more than fifteen months after the complaint was filed, is simply

> unfair to this defendant [Avitall]. That unfairness stems from the fact that an amendment would change the entire nature of this case now that plaintiffs [appellants] have achieved their stated goal of liquidating the assets of the corporation.

¶10 The trial court further stated: "I am not persuaded there is any compelling reason to allow amendment of the pleadings now, just when the defendants could reasonably believe that the suit was finally over, given the termination of the receivership and the sale of assets."

¶11 Nothing further occurred in this case until August 29, 2003, when Discovery filed a motion seeking reconsideration. Avitall responded to Discovery's motion by seeking dismissal of all claims against him. Due to judicial rotation, the case had been transferred to the Honorable Lee E. Wells.

¶12 The trial court held a hearing on the motions on November 24, 2003. The trial court began the hearing by stating:

> This is really a Chapter 128 case brought by creditors against Avid[C]are Corporation, and Boaz Avitall, as I can see it from the complaint, was really named as a defendant, not because their actions were against him but really because there was an assertion that somehow he had purchased or received property of Avid[C]are for less than fair market value ….

¶13 The trial court proceeded to elicit from Discovery's counsel the basis for seeking reconsideration and any proffered reasons to justify permitting amendment of the original complaint. Discovery's counsel indicated his belief that the original complaint was sufficient to pursue a piercing the corporate veil cause of action personally against Avitall, but wanted to file an amended complaint to "clarify" the allegations. The trial court ruled that Discovery did not provide it with any specific information as to their piercing the corporate veil

theory, did not allege any specific damages against Avitall, and that Discovery failed to provide it with any justifiable reason to permit the amendment.

¶14 The trial court denied the motion for reconsideration, denied Discovery's motion to amend the complaint, and granted Avitall's motion to dismiss "because there's nothing left to litigate." Judgment was entered; Discovery now appeals.

DISCUSSION

A. Sufficiency of the Complaint.

¶15 A motion to dismiss for failure to state a claim tests whether the complaint is legally sufficient to state a claim for which relief may be granted. ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997). The legal sufficiency of the complaint is a question of law, which we review independently. *See* ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). In examining the legal sufficiency of the complaint, we take the facts alleged as true. ***Id.*** We will affirm an order dismissing a complaint for failure to state a claim only if it appears that no relief can be granted under the factual allegations set forth in the complaint and any reasonable inferences that may be drawn from those facts. *See* ***Quesenberry v. Milwaukee County***, 106 Wis. 2d 685, 690, 317 N.W.2d 468 (1982).

¶16 Further, Wisconsin is a notice-pleading state and requires only a "short and plain statement of the claim," a "showing that the pleader is entitled to relief," and "[a] demand for judgment for the relief the pleader seeks." WIS. STAT.

§ 802.02(1)(a), (b) (2003-04).[2] "A complaint must be given a liberal construction in favor of stating a cause of action." ***Alonge v. Rodriquez***, 89 Wis. 2d 544, 552, 279 N.W.2d 207 (1979).

¶17 Based on these standards, we conclude that the complaint in this case falls short of the mark. Discovery contends that the allegations in the complaint sufficiently set forth a cause of action utilizing a piercing the corporate veil theory against Avitall personally. Discovery points to paragraph twelve of the complaint, which alleges: "As a matter of law, Plaintiffs are entitled to pierce AvidCare's corporate veil or treat AvidCare as the alter ego of Avitall." We are not persuaded.

¶18 This allegation does not provide any factual allegations at all. Rather, it is a "bald assertion" or "legal conclusion" insufficient standing alone to withstand a motion to dismiss. *See* ***Morse v. Lower Merion Sch. Dist.***, 132 F.3d 902, 906 (3rd Cir. 1997). In order to succeed on a piercing the corporate veil theory, there must be some factual allegations to show that the alleged "alter ego" of the corporation "exercised complete domination over the corporation with respect to the transaction at issue; and … that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil." *See* ***American Fuel Corp. v. Utah Energy Devel. Co., Inc.***, 122 F.3d 130, 134 (2d Cir. 1997). In order to demonstrate such, the following factors may be considered: (1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) the insolvency of the debtor corporation at the

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

time; (5) siphoning of the corporation's funds by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation is merely a façade for the operations of the dominant stockholder or stockholders. *See* ***United States v. Pisani***, 646 F.2d 83, 88 (3rd Cir. 1981).

¶19 The complaint in this case does not assert any of these factors. The complaint does not even allege Avitall's connection to AvidCare. Is he a stockholder? Is he an officer, director, employee or president? The complaint is silent as to his relationship. The only thing the complaint tells us about Avitall is that he is an "adult resident of the State of Wisconsin, residing at 4868 North Ardmor[e] Avenue, Whitefish Bay, Wisconsin."

¶20 Discovery contends that paragraphs 10 and 11 set forth allegations suggesting the failure to observe corporate formalities, siphoning of funds by the dominant stockholder, and using control over the corporation to commit fraud. We disagree with this assessment. Nowhere in either paragraph is there an assertion that Avitall controlled the corporation, manipulated this sale, or that he was the dominant shareholder. These allegations are not found anywhere within the four corners of the complaint.

¶21 Discovery also cites ***Scott v. City of Chicago***, 195 F.3d 950 (7th Cir. 1999), as instructive for the propositions that "[w]hether a complaint provides notice … is determined by looking at the complaint as a whole[,]" ***id.*** at 952, that "a 'complaint need not spell out every element of a legal theory' to provide notice," ***id.*** at 951 (citation omitted), and that "a plaintiff can plead conclusions as long as those conclusions provide the defendant with minimal notice of the claim."

Id. at 951-52 (citation omitted). We do not find ***Scott*** instructive in the instant case.

¶22 Although it is true that the ***Scott*** court emphasized looking at the complaint as a whole, such action does not help Discovery. Discovery's complaint, as a whole, does not set forth the minimum material factual allegations sufficient to withstand a motion to dismiss. It does not identify Avitall's connection to AvidCare nor does it assert a single fact demonstrating that AvidCare's corporate identity should be disregarded. Paragraphs 10 and 11 set forth only an allegation of deferential transfer which, under chapter 128, was a matter addressed by the appointment of a receiver. Paragraph 12 is a single conclusory statement regarding piercing the corporate veil.

¶23 Similarly, although ***Scott*** did state that conclusory statements are acceptable as long as they provide adequate notice of the claim to the defendant, the conclusion set forth in paragraph 12, with nothing more, fails to satisfy the ***Scott*** qualification. There is no factual context set forth in Discovery's complaint. There is no allegation as to how Avitall is connected to the corporation and no prayer for relief against him. The "Wherefore" clause in the complaint prays only for the sequestration of property and the appointment of a receiver. We conclude, therefore, that the sole conclusory allegation was insufficient to provide fair notice to Avitall that he was being sued personally. Thus, even under the most liberal construction, we conclude that the trial court did not err in dismissing the complaint.

B. Amendment of Pleadings.

¶24 Discovery also contends that the trial court erroneously exercised its discretion in denying its motion seeking to file an amended complaint to "clarify"

the factual allegations against Avitall. The trial court denied the motion for two reasons: first, Discovery failed to present it with any theory of personal liability against Avitall; and second, the chapter 128 case was over, the receiver had been discharged—meaning there were no assets left to recover. Whether to grant a request to amend pleadings is a matter within the court's discretion. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶12, 239 Wis. 2d 406, 620 N.W.2d 463. We cannot conclude that the trial court erroneously exercised its discretion when it denied the motion to amend the complaint.

¶25 Under WIS. STAT. § 802.09(1), a party may amend the pleadings "as a matter of course at any time within 6 months after the summons and complaint are filed." ***Id.*** Once that time has passed, the plaintiff "may amend the pleading only by leave of court" although "leave shall be freely given at any stage of the action when justice so requires." ***Id.*** As noted, after the six-month period has expired, it is within the broad discretion of the trial court whether to allow the plaintiff to amend the complaint. *See* ***Trispel v. Haefer***, 89 Wis. 2d 725, 731, 279 N.W.2d 242 (1979). We will not disturb the trial court's determination unless there was an erroneous exercise of discretion. ***Id.*** We will sustain a discretionary act when the record reflects that the trial court considered the relevant facts, applied the proper standard of law, and reached a reasonable conclusion using a demonstrated rational process. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶26 Here, the trial court properly exercised its discretion. The trial court explored the reasons for Discovery's delay in filing its amended complaint. Discovery contended that the delay in filing an amended complaint was due to the delays associated with the attempted sale of the corporation, the stay imposed on discovery, and the refusal of Avitall to cooperate with Discovery's discovery

attempts. The trial court then asked Discovery whether it had drafted an amended complaint for the court to review—so the court could see what additional factual allegations it would contain. Discovery had not. Further, Discovery did not offer orally to the court additional facts to support its theory. The trial court ruled that Discovery was seeking to amend its complaint without giving the court any indication as to the factual allegations it wanted to add to the complaint. This put the court in a position to believe that it was without any justifiable basis to permit the amendment.

¶27 Moreover, the gravamen of the complaint—the receivership action—had been completed. The receiver had been discharged, which presumably meant that the allegation that AvidCare had improperly transferred assets to Avitall was resolved. The record demonstrated to the trial court that anything Avitall or the corporation had was basically of *de minimis* value. There was nothing left. There was no reason to resurrect this complaint. Justice did not require permitting the amendment. Based on these facts and circumstances, we cannot conclude that the trial court's decision constituted an erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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