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DISTRICT II

December 13, 2023

To:

Hon. Sandra Jo Giernoth
Circuit Court Judge
Electronic Notice

Dean P. Laing
Electronic Notice

Sarah Adjemian
Clerk of Circuit Court
Washington County Courthouse
Electronic Notice

Matthew W. O'Neill
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2023AP323

Thomas M. Keyes v. Steven L. Schmidt (L.C. #2022CV394)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Thomas M. Keyes and Kirk R. Hegna, who are two minority shareholders of Affinity, Inc., appeal an order dismissing their complaint against Steven L. Schmidt, who is president and majority voting shareholder of Affinity. The circuit court dismissed Keyes and Hegna's complaint on the basis that their breach-of-contract allegations could only be brought as a derivative action. On appeal, Keyes and Hegna argue the derivative-action rule does not apply in this case and they have a contractual right to bring a direct action against Schmidt. Based upon

our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

Keyes and Hegna brought suit against Schmidt, alleging he violated non-compete covenants in the Affinity Stock Restriction Agreement (“Agreement”) by generally co-founding and working for a competing company and diverting business from Affinity to that competing company. In their complaint, Keyes and Hegna alleged they were entitled to bring this action against Schmidt directly because the Agreement provided:

Upon breach of any of these covenants, the Corporation or any shareholder shall have the right to seek monetary damages for any past breach and equitable relief, including specific performance by means of any injunction, to prevent any further breach. In lieu thereof, or should a court refuse for any reason to grant equitable relief to prevent continuing breaches of these covenants, the Corporation shall be entitled to liquidated damages equal to the greater of:

(i) The unpaid balance due on any installment note for the purchase price authorized by Section 5; or

(ii) Fifty percent (50%) of the gross amount derived by the breaching party from all transactions in breach of the covenants in this Subsection, it being agreed that such amount represents the estimated amount of profit the Corporation could have derived if it had transacted the business in question.

Schmidt moved to dismiss the complaint on the basis that Keyes and Hegna’s breach-of-contract claims could only be pursued derivatively and Keyes and Hegna did not comply with the statutory conditions precedent needed to pursue a derivative action. *See Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶21, 356 Wis. 2d 665, 849 N.W.2d 693 (To survive a

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

motion to dismiss, “a complaint must plead facts, which if true, would entitle the plaintiff to relief.”).

The circuit court granted Schmidt’s motion to dismiss, concluding Keyes and Hegna’s claims were derivative and could not be brought directly because the alleged breaches related to duties Schmidt owed Affinity and because Keyes and Hegna did not suffer an injury separate and distinct from that suffered by other shareholders. Keyes and Hegna appeal.

When determining whether a shareholder may assert a direct claim, as opposed to a derivative claim, the fundamental inquiry is “[w]hose right is sought to be enforced.” *Rose v. Schantz*, 56 Wis. 2d 222, 229, 201 N.W.2d 593 (1972). “[W]here the injury to the corporation is the primary injury and any injury to a shareholder is secondary, the shareholder may not bring a direct action, and is instead limited to commencing a derivative action.” *Park Bank v. Westburg*, 2013 WI 57, ¶43, 348 Wis. 2d 409, 832 N.W.2d 539. The fact that an injury to the corporation may have a subsequent effect on the value of individual shareholders’ shares is not enough to create a right to bring a direct action, rather than a derivative action[.] *Rose*, 56 Wis. 2d at 229.

Keyes and Hegna argue the derivative action rule does not apply in this case because the Agreement gives them a contractual right to pursue their breach of contract claims against Schmidt directly. We disagree.

It is well established that “[i]n order for a shareholder to have an independent claim, the injury must be ‘one to the plaintiff as a shareholder as an individual, and not to the corporation.’” *Ewer v. Lake Arrowhead Ass’n, Inc.*, 2012 WI App 64, ¶19, 342 Wis. 2d 194, 817 N.W.2d 465 (citation omitted). Although “claims other than one for breach of a fiduciary duty may require a

different analysis to determine whether the direct injury is to the shareholder or member as an individual or, instead, is to the corporation[,] [t]his is the fundamental inquiry.” *Id.*, ¶25 (emphasis added). “Any injury to a corporation gives no individual right of action, although the injury to the corporation may incidentally result in the depression of the value of the stocks and bonds.” *Marshfield Clinic v. Doege*, 269 Wis. 519, 526-27, 69 N.W.2d 558 (1955).

Here, the injuries alleged in Keyes’ complaint were to Affinity, not to Keyes and Hegna individually. The complaint alleged that Schmidt breached the Agreement by “[c]ompeting with Affinity,” “[s]oliciting Affinity’s customers,” “disclosing and divulging confidential information of Affinity,” “[i]nvesting in and becoming a shareholder, director and officer” of a company that is in the same or similar business as Affinity, and receiving compensation for directing business to an Affinity competitor. As to Keyes and Hegna, the complaint only alleged they have been “independently damaged” by Schmidts’ purported breaches. *See Data Key*, 356 Wis. 2d 665, ¶21 (“Bare legal conclusions set out in a complaint provide no assistance in warding off a motion to dismiss.”). Nothing in the complaint suggests Keyes and Hegna suffered an injury separate and distinct from that suffered by other shareholders. Because the complaint does not allege that Keyes and Hegna suffered injuries separate and distinct from those suffered by the other shareholders, they are not permitted to bring a direct action against Schmidt. *See Park Bank*, 348 Wis. 2d 409, ¶43. The circuit court properly dismissed the complaint against Schmidt. *See Data Key*, 356 Wis. 2d 665, ¶19-21.

Upon the foregoing reasons,

IT IS ORDERED that the order is affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals