

EDITED BY THE COURT

<p>LOWELL CAVE; HEATHER CAVE; SHORE SAND & GRAVEL, LLC; 20 MAPLE AVENUE, LLC; 2324 COLUMBIA AVENUE, LLC; and CAVE HOLDINGS/ROUTE 130, LLC;</p>	<p>SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY</p>
<p>Plaintiffs,</p>	<p>DOCKET NO.: BUR-L-243-21</p>
<p>v.</p>	<p>CIVIL ACTION</p>
<p>AARON CAVE; RIVER FRONT RECYCLING & AGGREGATE, LLC; JOHN DOES I-X; ABC CORPORATIONS I-X</p>	<p>ORDER</p>
<p>Defendants/Counterclaimants Third-Party Plaintiffs</p>	
<p>v.</p>	
<p>LEX NOVA LAW, LLC; PETER R. SPIRGEL; DARREN H. GOLDSTEIN; and WILLIAM S. SKINNER</p>	
<p>Third-Party Defendants</p>	

THIS MATTER having come before the Court by Plaintiffs Shore Sand & Gravel, LLC, Lowell Cave, and Heather Cave, by and through their counsel, Lex Nova Law, LLC, and the Court having reviewed the moving papers, any opposition thereto, the arguments of counsel, and for good cause shown:

IT IS on this 29th day of November 2022:

ORDERED that all derivative claims in Defendants’ Counterclaim and Third-Party Complaint are **DISMISSED** with **PREJUDICE**;

IT IS FURTHER ORDERED that counsel shall meet and confer in person no later than December 16, 2022, to address amending the Counterclaim and Third-Party Complaint to remove

all derivative claims. Thereafter, the Court will hold a Case Management Conference on January 4, 2023, at 10:00 AM at which time Plaintiffs will be given a deadline for the filing of responsive pleadings and discovery deadlines will be set.

IT IS FURTHER ORDERED that the moving party shall serve a copy of this Order on all parties not otherwise served via eCourts within seven (7) days of receipt.

/s/ Aimee R. Belgard

Hon. Aimee R. Belgard, P.J. Cv.

- Motion Opposed
- Motion Unopposed

<p>LOWELL CAVE; HEATHER CAVE; SHORE SAND & GRAVEL, LLC; 20 MAPLE AVENUE, LLC; 2324 COLUMBIA AVENUE, LLC; and CAVE HOLDINGS/ROUTE 130, LLC;</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>AARON CAVE; RIVER FRONT RECYCLING & AGGREGATE, LLC; JOHN DOES I-X; ABC CORPORATIONS I- X</p> <p style="text-align: center;">Defendants/Counterclaimants Third-Party Plaintiffs</p> <p>v.</p> <p>LEX NOVA LAW, LLC; PETER R. SPIRGEL; DARREN H. GOLDSTEIN; and WILLIAM S. SKINNER</p> <p style="text-align: center;">Third-Party Defendants</p>	<p>SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY</p> <p>DOCKET NO.: BUR-L-243-21</p> <p>CIVIL ACTION</p> <p>STATEMENT OF REASONS PURSUANT TO R. 1:6-2(f)</p>
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I. PRELIMINARY STATEMENT

Plaintiffs Lowell Cave, Heather Cave, and Shore Sand & Gravel (hereinafter “SSG”) filed a Motion to Dismiss with prejudice under R. 4:6-2(e). The Plaintiffs seek to dismiss all derivative claims in the Counterclaim brought by Defendant Aaron Cave in the BUR-L-243-21 action and the derivative claims brought as part of the Third-Party Complaint filed by Defendant Aaron Cave and Defendant River Front Recycling & Aggregate, LLC. Plaintiffs contend that the Defendants cannot bring their derivative claims as their interests directly conflict with the interests of the other members of SSG, Heather Cave and Lowell Cave. Additionally, the Plaintiffs argue that antagonism exists between Aaron Cave and the other members of SSG such that the basic purposes of a derivative action are frustrated in this case.

In opposition, Defendants contend that the Revised Uniform Limited Liability Company Act does not require that a derivative action fairly represent the interests of the other shareholders or members of the company and instead only requires that a member filing the derivative action be a member at the time the action is commenced and remains a member as the action continues. Alternatively, the Defendants argue that Aaron Cave does fairly and adequately represent the interests of SSG and therefore the derivative action should proceed.

For the reasons set forth herein, the Court **GRANTS** Plaintiffs' Motion to Dismiss, dismissing the Defendants' derivative claims with prejudice.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter arises from a dispute over the contract and managerial rights between the members of SSG which is a closely held LLC owned by members of the Cave family. Defendant Aaron Cave and Plaintiff Heather Cave both retain a 48% interest in the company with Plaintiff Lowell Cave retaining a 4% interest in the company. Plaintiffs brought this lawsuit on September 15, 2020, and subsequently amended the Complaint twice, filing the Second Amended Complaint on August 15, 2022. The Second Amended Complaint includes multiple causes of action such as breach of contract, unjust enrichment, mismanagement, breach of fiduciary duty, trespass, and promissory estoppel. The Defendants have since brought Counterclaims and Third-Party claims against the Plaintiffs. This action is also consolidated with two other Law Division actions, BUR-L-2145-21, and BUR-L-2768-21.

Plaintiffs filed the instant Motion to Dismiss on October 18, 2022. The Defendants filed their Opposition on November 14, 2022, with the Plaintiffs then filing their Reply Brief on November 22, 2022. The current discovery end date in this action is set for February 28, 2023.

III. ARGUMENTS

a. Plaintiffs' Motion to Dismiss

Plaintiffs first argue that “the only reason Aaron asserts derivative claims is to conjure a conflict of interest where one does not exist.” (Pl. Br., 13). Plaintiffs contend that the Defendants only filed their derivative claims to support the Defendants’ pending Motion to Disqualify. Id.

Next, Plaintiffs argue that Aaron Cave does not have standing to bring derivative claims on behalf of SSG. Id. Plaintiffs point to R. 4:32-3 which states that a derivative action may not be maintained if the plaintiff does not fairly represent the interests of the shareholders. Id. Plaintiffs cite several cases from the 3rd Circuit which have dismissed derivative claims because the interest of the party asserting the claims are antagonistic to the other shareholders and the company he seeks to represent. (Pl. Br., 14-15). Plaintiffs argue that several factors determine whether a plaintiff’s interests are antagonistic to those of the relevant shareholder class, including: economic antagonisms between the representative and the class; the remedy sought by the plaintiff in the derivative action; other litigation pending between plaintiff and defendants; the relative magnitude of the plaintiff’s personal interests as compared to his interest in the derivative action itself; plaintiff’s vindictiveness toward the defendants; and the degree of support plaintiff was receiving from the shareholders he purported to represent. (Pl. Br., 15, citing Vanderbilt v. Geo-Energy Ltd., 725, F.2d 204, 207 (3d Cir. 1983)).

Plaintiffs contend that Aaron’s counsel cannot competently represent SSG derivatively while also suing SSG and defending Aaron against claims brought by SSG. Id. Plaintiffs argue that Aaron is precluded from suing derivatively on behalf of SSG because SSG has pending claims, including fraud, against Aaron. Plaintiffs contend that courts routinely dismiss derivative

claims when the party seeking to assert the claims is involved in litigation against the company that the party seeks to represent derivatively. (Pl. Br., 16-17).

Plaintiffs also argue that Aaron is precluded from suing derivatively because he is causing his wholly owned company, River Front Recycling, to sue SSG. Plaintiffs contend that Aaron cannot possibly purport to represent SSG's best interests and act in a fiduciary capacity for SSG while simultaneously causing his wholly owned company to sue SSG for approximately \$1.5 million. (Pl. Br., 17).

Plaintiffs point to the factors outlined in Vanderbilt v. Geo-Energy Ltd. to assert that a derivative action is inappropriate here because Aaron has exhibited economic antagonism towards SSG and the other owners of SSG; because the remedies being sought by Aaron (personally and derivatively) create a conflict of interest; because other litigation is ongoing between the parties; because Aaron's loyalty here is to River Front and to himself, not to SSG; because of the vindictiveness shown by Aaron which overshadows any desire to enforce SSG's rights; and because of the lack of support from any other owners of SSG for his derivative claims. (Pl. Br., 18-23).

Lastly, Plaintiffs assert that derivative claims are not appropriate in disputes involving closely-held companies and that Aaron will not be prejudiced by dismissal of the derivative claims. Plaintiffs argue that courts will treat derivative claims by an owner of a closely-held company as individual claims if the court finds that recovery will not: (1) unfairly expose the company or the defendants to a multiplicity of actions, (2) materially prejudice the interests of the creditors of the company, or (3) interfere with a fair distribution of the recovery among all interested persons. (Pl. Br., 24). Plaintiffs argue that dismissal of the derivative claims here will not expose SSG to further litigation, would not prejudice the creditors of SSG, and will not

interfere with the distribution of any recovery because Aaron, individually, would receive any recovery to the extent of his damages. Dismissing Aaron's derivative claims will not preclude Aaron from alleging any supposed wrongdoing against Lowell or Heather. (Pl. Br., 24). Plaintiffs lastly assert that the derivative claims here are not in SSG's interests. (Pl. Br., 25).

b. Defendants' Opposition

Defendants argue that the derivative claims filed by Aaron on behalf of SSG are strictly in accordance with N.J.S.A. 42:2C-68. (Def. Br., 2). Defendants contend that the Plaintiffs rely on case law and statutes relating to corporations to support their motion. However, the provisions governing derivative actions under the New Jersey Business Corporation Act are different from the provisions governing derivative actions in the New Jersey Revised Uniform Limited Liability Company Act. (Def. Br., 3).

According to Defendants, the New Jersey Revised Uniform Limited Liability Company Act (N.J.S.A. 42:2C-68) states that a member may maintain a derivative action to enforce a right of a limited liability company if a demand for action by management is made and refused, or if such a demand would be futile. (Def. Br., 3). Defendants argue that the only precondition of the statute is that the member filing the derivative action is a member at the time the action is commenced and remains a member as the action continues. (Def. Br., 3, citing N.J.S.A. 42:2C-69).

Defendants contend that the Plaintiffs rely on case law and statutes relating to corporations and that the provisions governing derivative actions under the New Jersey Business Corporation Act (N.J.S.A. 14A:3-6.2) (hereinafter the "BCA") are different than the provisions under the New Jersey Revised Uniform Limited Liability Company Act (hereinafter the "LLCA"). According to the Defendants, under the BCA, a shareholder may not commence or

maintain a derivative proceeding unless the shareholder “fairly and adequately represents the interest of the corporation in enforcing the right of the corporation.” (Def. Br., 4). Defendants argue that this provision is absent from the LLCA and therefore the condition of adequate representation in the BCA does not apply here. (Def. Br., 4).

Next, Defendants contend that even if the requirement of adequate representation applies here, Aaron Cave fairly and adequately represents the interests of SSG in enforcing the rights of SSG. (Def. Br., 4). Defendants contend that all members of SSG agreed to the “Support Agreement” whereby SSG would sell its assets to a third party for \$6,050,000.00. The members agreed that River Front Recycling would receive a sum of \$1,493,419.52 from the SSG sale and that River Front is entitled to the amount which it claims in its lawsuit against SSG. Therefore, due to prior agreements with all members of SSG, Aaron Cave and River Front are entitled to receive what they are claiming in their lawsuits and therefore the litigation initiated by River Front does not constitute economic antagonism. (Def. Br., 5).

Lastly, Defendants argue that Aaron cannot assert the claim which he has asserted on a derivative basis as an individual claimant. (Def. Br., 7). The derivative action claims that Lowell Cave has harmed SSG. According to the “direct action” section of the LLCA, a member can only maintain a derivative action if the member pleads and provides an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the LLC. However, Aaron Cave is claiming that the injuries being suffered here are by the LLC. (Def. Br., 7-8).

c. Plaintiffs’ Reply Brief

Plaintiffs contend that the Defendants only seek to assert a derivative action in order to create a nonexistent conflict of interest. (Pl. Reply, 3). Plaintiffs argue that this is true because the Defendants have not rebutted this assertion in their opposition.

Plaintiffs also argue that Aaron Cave is permitted to assert the claims as an individual because New Jersey courts have permitted owners of closely-held companies to assert individual claims in what would normally be required to be asserted as derivative claims. (Pl. Reply, 3-4). Plaintiffs cite Brown v. Brown, 323 N.J. Super. 30, 36-39 (App. Div. 1999), which held that individual recovery is permitted if the recovery will not (1) unfairly expose the company or the defendants to a multiplicity of actions, (2) materially prejudice the interests of creditors of the company, or (3) interfere with a fair distribution of the recover among all interested persons. (Pl. Reply, 4). Plaintiffs argue that derivative claims under the LLCA are not necessary here as the “derivative” claims here are essentially just disputes between Aaron and his family members.

Plaintiffs contend that while the LLCA does not include language specifically requiring that Aaron fairly represent SSG, the Defendants offer no logical reason why that standard should not also apply to LLCs the way that it does to corporations. Additionally, R. 4:32-3 does require Aaron Cave to be able to fairly represent an LLC and its owners to assert a derivative claim. (Pl. Reply, 6).

Plaintiffs reargue that the Vanderbilt factors weigh heavily in favor of dismissal of the derivative claims here as SSG has pending claims (including fraud) against Aaron, Aaron’s interests are economically antagonistic to SSG, a conflict of interest exists between Aaron and SSG, the magnitude of Aaron’s personal interests in the litigation dwarf his purported interests in protecting SSG, and because this litigation has shown Aaron’s vindictiveness towards the other members of SSG. (Pl. Reply, 6-10).

Lastly, Plaintiffs assert that the Support Agreement is not an admission of liability. Instead, the agreement is nothing more than a settlement that Plaintiffs are willing to endure to

be rid of business entanglements with Aaron and, as such, the terms of the Support Agreement do not suggest that Aaron or River Front are entitled to anything in litigation. (Pl. Reply, 11).

IV. LEGAL STANDARD

A motion under R. 4:6-2(e) is a statement by a defendant that there is no legal claim alleged by the plaintiff. A court is “to approach with great caution applications for dismissal under R. 4:6-2(e) for failure to state a claim on which relief may be granted.” Printing Mart v. Sharp Electronics Corp., 116 N.J. 739, 771-72 (1989).

The court is to search the complaint in depth to determine if a claim is even suggested in the papers. Id. at 746. The court is not concerned with plaintiff’s ability to prove the allegations but rather only that a cause of action can be gleaned from the complaint. Printing Mart, supra, at 746; Smith v. SBC Communications, Inc., 178 N.J. 265, 282 (2004).

All facts alleged in the complaint are to be taken as true. Craig v. Suburban Cablevision, 140 N.J. 623, 625 (1995). These allegations must be reviewed with great liberality, and all inferences resolved in favor of the plaintiff. Communication Workers of America v. Whitman, 298 N.J. Super. 162, 166-167 (App. Div. 1997). However, it should be remembered that discovery is intended to lead to facts supporting or opposing a legal theory, not to the formulation of one. Camden County Energy Recovery Assocs, L.P. v. N.J. Dep. Of Environmental Protection, 320 N.J. Super. 59, 64 (App. Div. 1999). Legal sufficiency requires allegation of all the facts that the cause of action requires. Cornett v. Johnson & Johnson, 414 N.J. Super. 365, 385 (App. Div. 2010). Without such allegations, the claim must be dismissed. Id.

Generally, if a matter is to be dismissed under R. 4:6-2(e), “(it) should be without prejudice to a plaintiff filing an amended complaint.” Printing Mart, supra. at 772. However,

when the plaintiff has not offered either a certification or a proposed amended pleading that would suggest their ability to cure the defects of the complaint, and it appears to the court that the opportunity to amend would be futile, the appellate court has found it proper to dismiss the complaint with prejudice. Johnson v. Glassman, 401 N.J. Super. 222, 246-247 (App. Div. 2008). Amendment remains a matter addressed to the court's sound discretion. Id.

V. ANALYSIS

Several sources govern derivative actions by shareholders. R. 4:32-3 governs derivative actions and states the following:

In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified and allege that the plaintiff was a shareholder at the time of the transaction complained of, or that the share thereafter devolved by operation of law. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as is desired, and the reasons for the failure to obtain such action or the reasons for not making such effort. Immediately on filing the complaint and issuing the summons, the plaintiff shall give such notice of the pendency and object of the action to the other shareholders as the court by order directs. The derivative action may not be maintained if it appears that the plaintiff does not fairly represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. Rule 4:32- 2(e) ("Settlement, Voluntary Dismissal, or Compromise") is applicable to actions brought under this rule.

R. 4:32-3

The Revised Uniform Limited Liability Company Act (hereinafter "LLCA") also outlines the procedures for the members of LLCs to bring derivative actions. The LLCA allows for both direct actions by a member and for derivative actions. The direct-action section states the following:

Direct Action by Member.

- a) Subject to subsection b. of this section, a member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement or this act or arising independently of the membership relationship.
- b) A member maintaining a direct action under this section shall plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.

N.J.S.A. 42:2C-67.

The derivative action section states the following:

Derivative Action. A member may maintain a derivative action to enforce a right of a limited liability company if:

- a) the member first makes a demand on the other members in a member-managed limited liability company, or the managers of a manager-managed limited liability company, requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action within a reasonable time; or
- b) A demand under subsection a. of this section would be futile.

N.J.S.A. 42:2C-68.

The LLCA also includes a “proper plaintiff” section which states the following:

Proper Plaintiff.

- a. Except as otherwise provided in subsection b. of this section, a derivative action under section 68 of this act may be maintained only by a person that is a member at the time the action is commenced and remains a member while the action continues.
- b. If the sole plaintiff in a derivative action dies while the action is pending, the court may permit another member of the limited liability company to be substituted as plaintiff.

N.J.S.A. 42:2C-69

Here, the Defendants are correct that the LLCA and not the BCA applies as SSG is a closely held LLC. The LLCA does not include any language requiring that a plaintiff fairly and adequately represent the interests of the company or other shareholders. However, the LLCA

must be read in conjunction with the language of R. 4:32-3 which explicitly requires a plaintiff in a derivative action to “fairly represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.” The Court finds no conflict between the LLCA and R. 4:32-3 as the statute outlines who constitutes a proper plaintiff when bringing a derivative lawsuit while the rule imposes an additional requirement of fair representation in all derivative actions brought to enforce a right relating to an association either incorporated or unincorporated.

The Court finds that the Defendants’ pleadings are devoid of any information suggesting that Aaron Cave fairly represents the interests of the similarly situated members of SSG. The most similarly situated member would be Heather Cave who shares a 48% interest in the company. However, she clearly has adverse interests with Defendant Aaron Cave as both Aaron Cave and Heather Cave are asserting claims against one another in the various consolidated actions associated with this case.

Additionally, the Court finds that substantial antagonisms exist between Aaron Cave and the other members of SSG such that the basic purpose of a derivative action would be frustrated. The 3rd Circuit in Vanderbilt v. Geo-Energy Ltd., 725, F.2d 204, 207 (3d Cir. 1983) held that a plaintiff’s derivative action should be dismissed if the court finds that “the class representative has interests antagonistic to those of the class.” Id. The Vanderbilt court outlined several factors which help in determining whether a plaintiff’s interests could be antagonistic to those of other shareholders. These factors include:

- economic 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
- the degree of support plaintiff was receiving from the shareholders he purported to represent.

Id.

The Court finds that several of these factors are present here. The Defendant has no support from the other shareholders that he purports to represent, other litigation is pending between the Defendant and Plaintiffs as both sides have asserted claims and crossclaims, and personal antagonism exists between Aaron Cave and the Plaintiffs. Additionally, the Court finds that the personal interests of the Defendant outweigh his interest in the derivative action because the Defendant has an interest in maintaining the derivative action in order to create a conflict of interest for Plaintiffs' counsel. Moreover, the Court finds that maintaining the derivative action on behalf of SSG would create a conflict of interest for the Defendants' counsel when the Defendants are also asserting claims against SSG in the other consolidated actions.

While the Defendant here can maintain his personal claims against the Plaintiffs, the Court cannot glean a cause of action for a derivative claim brought by the Defendant. Due to the nature of this case where the other members of SSG are asserting claims against Aaron Cave and Aaron Cave is likewise asserting claims against the other members of SSG, the Court finds that any amendment of the pleadings would be futile as the basic purpose of a derivative action is frustrated by the conflicting interests of the members.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Plaintiffs' Motion to Dismiss, dismissing the Defendants' derivative claims with prejudice.