Superior Court of New Jersey, Law Division, Bergen County

June 20, 2014, Argued; June 20, 2014, Decided

DOCKET NO.: BER-L-1952-14 Civil Action

HARALAMBOS A. KOSTAKOPOULOS, YASEMIN K. KOSTAKOPOULOS, and ALEXANDER CROKOS,

Plaintiffs,

vs.

ALMA BANK and EFSTANTHIOS VALIOTIS, Defendants.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION. PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Counsel: [*1] Trent S. Dickey, Esq., on behalf of Plaintiffs Haralambos Kostakopoulos, Yasemin Kostakopoulos and Alexander Crokos (Sills Cummis & Gross, P.C.).

Douglas A. Stevinson, Esq., on behalf of Defendant Alma Bank (Windels Marx Lane & Mittendorf, LLP).

Eric B. Levine, Esq., on behalf of Defendant Efstatios Valiotis (Lindabury McCormick Estabrook & Cooper, P.C.).

Judges: Honorable Robert C. Wilson, J.S.C.

Opinion by: Robert C. Wilson

Opinion

Civil Action

INTRODUCTION

THIS MATTER comes before the Court pursuant to two motions brought by Defendants Efstathios Valiotis and Alma Bank to dismiss Plaintiffs' Complaint for failure to state a claim. Opposition was filed on behalf of the Plaintiffs, Haralambos S. Kostakopoulos, Yasemin K. Kostakopoulos and Alexander Crokos, and oral argument was held on June 20, 2014.

FACTUAL BACKGROUND

As stated exclusively in the Plaintiffs' Complaint and Plaintiff's pleadings on this motion, the facts alleged in the current action are as follows. The Plaintiffs, Dr. and Mrs. Kostakopoulos and Mr. Crokos, were minority shareholders in Fort Lee Bank. The Plaintiffs collectively owned 49.54% of the stock of Fort Lee Bank. On or about March 15, 2001, the Fort Lee Bank became a federally chartered savings bank and commenced operations. Fort Lee Bank's business plan was to be rooted in the immigrant communities of the greater New York metropolitan area with the mission of turning ²dreams into prospects². With the guidance of Dr. and Mrs. Kostakopoulos and their Greek and Turkish ancestry, Fort Lee Bank made a commitment to immigrant communities. Within the first ten years of its operation, Fort Lee Bank opened a second location in Clifton, New Jersey. Beginning in February 2010, the Office of Thrift Supervision (²OTS²) began a series of actions impacting Fort Lee Bank concerning issues that had not been raised in any previous OTS examination. As a result, Fort Lee Bank engaged a nationally recognized accounting firm, that was acceptable to OTS, to analyze its car loan portfolios. The resulting accounting did not show any problems, however, OTS issued a Cease and Desist Order dated October 6, 2010 requiring, among other things, that Fort Lee Bank raise its capital ratios. In response to the Cease and Desist Order, Fort Lee Bank began to search for potential investors. Among the likely candidates was Defendant Alma Bank. During the months when Plaintiffs were considering the various investors, Dr. Kostakopoulos was in direct contact with Defendant Efsthathios Valitois, the majority shareholder of Alma Bank. Plaintiffs allege that during these conversations, Mr. Valitois expressed his support for a merger between the two banks.

On or about February 24, 2011, Fort Lee Bank and Alma Bank signed a Mutual Non-Disclosure Agreement (²MNDA²) in connection with the potential investment by Alma Bank in Fort Lee Bank. The obligations of the MNDA were effective until one year after the last date of the disclosure of confidential information under the agreement, or upon rejection or completion of the confidential discussions of the potential investment. On or about June 16, 2011 it was decided to negotiate a merger agreement with Alma Bank because its proposal was viewed as the most favorable. On June 20, 2011 Alma Bank and Fort Lee Bank entered into a non-binding indication of interest letter (²LOI²) setting forth the terms under which Alma Bank would be willing to acquire Fort Lee Bank. The LOI set forth a proposed purchase price of $3 million, and indicated a proposed structure under which Fort Lee Bank would be a stand-alone subsidiary. The LOI also required the parties to use commercially reasonable efforts to cooperate regarding the negotiation of a definitive agreement. Both parties, after careful consideration, finalized the

merger agreement on September 15, 2011 with Alma Bank indicating that its Board of Directors would approve the agreement at its September 20, 2011 Board meeting to consummate the merger.

On September 16, 2011, Fort Lee Bank was served with a Special Inspector General-TARP Informational Subpoena (²SIG-TARP Subpoena²). Fort Lee Bank immediately notified Alma Bank of the SIG-TARP Subpoena, believing that it did not constitute a major event to nullify the Merger Agreement. In response, Alma Bank indicated that its Board would not consider executing the Merger Agreement until the SIG-TARP Subpoena was resolved. Plaintiffs allege that Alma Bank represented that once the SIG-TARP Subpoena was resolved Alma Bank would proceed with the Merger Agreement and Fort Lee Bank should make all efforts to resolve the SIG-TARP Subpoena.

On October 31, 2011 Alma Bank sent a letter stating that it was ending negotiations with Fort Lee Bank. However, Plaintiffs contend that Alma Bank representatives, including Defendant Valiotis, continued to assure Plaintiffs that Alma Bank would consummate the proposed transaction as soon as the SIG-TARP Subpoena was resolved. Although Plaintiffs resumed efforts to find other investors, they believed the private statements by Alma Bank representatives.

On or about November 14, 2011 the Office of the Comptroller of the Currency (²OCC²), the successor to

OTS, initiated another examination of Fort Lee Bank. While both the SIG-TARP Subpoena and the OCC examination were pending, Defendant Valiotis contacted Dr. Kostakopoulos and suggested that Fort Lee Bank contact the Assistant U.S. Attorney to seek a resolution of the SIG-TARP Subpoena so that Alma Bank could proceed with the proposed merger.

On January 30, 2012 Fort Lee Bank reported a Tier 1 capital ratio of 2.23% in its December 31, 2011 Thrift Financial Report. However, the OCC demanded that Fort Lee Bank further increase its reserves, a change that resulted in a capital ratio of 1.98% which is below the statutory 2% ratio for Tier 1 status. Subsequently, the OCC advised Fort Lee Bank that it had until May 21, 2012 to raise its capital ratios by 10% and 15%. Plaintiffs informed Alma Bank of this event and in the subsequent weeks, consistently appraised the Defendants of its efforts to comply with the OCC directives.

On March 1, 2012, the OCC and FDIC met with Fort Lee Bank's Board of Directors to discuss the financial statistics regarding the Bank's capital, the potential merger with Alma Bank and its effect on an appointed Receiver for Fort Lee Bank, as well as the May 21, 2012 deadline. Following the meeting with the OCC and the FDIC, Fort Lee Bank's attorneys contacted the Assistant U.S. Attorney handling the OCC examination and offered Dr. Kostakopoulos for an interview which took place in April 2012. Prior to the interview, Alma Bank representatives, communicated with the OCC to voice Alma Bank's desire to consummate the Merger Agreement. On April 19, 2012 the Plaintiffs were given notice that the SIG-TARP Subpoena was being terminated and no adverse action would be taken. Plaintiffs immediately notified Alma Bank.

However, on April 20, 2012 Alma Bank stated that it was no longer interested in the proposed merger. Plaintiffs, shocked by Alma Bank's retreat, scrambled to prepare a synopsis of a proposed transaction with Hartford Funding Ltd. Investor Group to present to the OCC. The proposed transaction with Hartford Funding Ltd. Investor Group included a merger providing a minimum of $4 million capital infusion, plus a net increase in annual revenue of $500,000.00. On the same day the proposal was made, the OCC rejected the proposal, rejected a two-week period to submit a comprehensive presentation, revoked Fort Lee Bank's charter, appointed the FDIC as receiver and announced that Alma Bank would be the purchaser of

select Fort Lee Bank assets. At the time of its closing by the OCC, Fort Lee Bank had total deposits over $47 million and total assets over $48 million. The Bank's shareholders had contributed $4.2 million of equity capital. As of April 20, 2012 Dr. and Mrs. Kostakopoulos each owned 22.5% of Fort Lee Bank's outstanding shares and Mr. Crokos owned by proxy 4.54% of the outstanding shares.

The Plaintiffs contend that the OCC acted so swiftly to reject For Lee Bank's submission because Alma Bank was secretly negotiating such purchase with the OCC while intentionally misleading Fort Lee Bank. The Plaintiffs allege that Alma Bank used their knowledge of Fort Lee Bank's confidential information to prevent the Plaintiffs from completing another proposed transaction with other potential investors and to calibrate Alma Bank's bid to the FDIC and control the process of its eventual purchase of assets. Upon such belief, the Plaintiffs filed this action on February 27, 2014 asserting claims against the Defendants for intentional interference with prospective economic advantage, fraud, negligent misrepresentation, and unjust enrichment.

RULES OF LAW

On a motion to dismiss pursuant to *R. 4:6-2(e)*, the Court must treat all factual allegations as true and must carefully examine those allegations ²to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . .² *Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746, 563 A.2d 31 (1989)*. After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. *Id.*

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. *R. 4:6-2(e)*; *see Pressler, Current N.J. Court Rules*, Comment 4.1.1. to *Rule 4:6-2(e)*, at 1348 (2010) (citing *Printing Mart, 116 N.J. at 746*). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. *See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365, 901 A.2d 871 (2006)*; *Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66, 876 A.2d 253 (2005)*; *Fazilat v. Feldstein, 180 N.J. 74, 78, 848 A.2d 761 (2004)*. The ²test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts.² *Printing Mart, 116 N.J. at 746*. However, ²a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief.² *Sickles v. Cabot Corp., 379 N.J. Super. 100, 106, 877 A.2d 267 (App. Div. 2005)*.

DECISION

The Plaintiffs in this case are the former minority shareholders of Fort Lee Bank, owning 49.54%, who are seeking to recover their losses based upon the alleged wrongful conduct of the Defendants. However, the alleged wrongful conduct impacted Fort Lee Bank, as a separate and distinct entity from its shareholders. Courts in New Jersey have long held as a fundamental principal of corporation law that, A corporation is regarded as an entity separate and distinct from its shareholders. It is a principle of corporation law that regard for the corporate personality demands that suits to redress corporate injuries which secondarily harm all shareholders alike are brought only by the corporation...the prevailing American rule is that when an injury to corporate stock falls equally on all shareholders, then an individual stockholder may not recover for the injury to his stock alone, but must seek recovery derivatively on behalf of the corporation. *Strasenburgh v. Straubmuller, 146 N.J. 527, 549-53, 683 A.2d 818(1996)*. This legal precept has been

applied consistently in New Jersey. *See Pepe v. General Motors Acceptance Corp., 254 N.J.Super. 662, 666, 604 A.2d 194 (App. Div. 1992)*, *certif. denied 130 N.J. 11, 611 A.2d 650 (1992)* (affirming a dismissal of claims by individual shareholders asserting losses sustained from the ²destruction of their corporations.²); *Schulman v. Wolff & Samson, 401 N.J. Super. 467, 478, 951 A.2d 1051 (App. Div. 2008)* (dismissing claims of individual shareholders for breach of fiduciary duty after determining that such claims were derivative claims); *Container Mfg. Inc. v. CIBA-GEIGY Corp., 870 F.Supp. 1225, 1231-32 (D.N.J. 1994)* (finding that a 50% shareholder of the Plaintiff corporation did not have an individual cause of action against a defendant that had allegedly published incorrect information about a product that the plaintiff manufactured).

In *Pepe*, the Appellate Division held that the plaintiffs' fraud and tortious interference claims ²all assert losses sustained by them as a the result of the destruction of their corporations. As such, the claims are entirely derivative of causes of action which, but for their release by the bankruptcy stipulation, would be available to the corporations.² *Pepe, 254 N.J. Super. at 666*. The Court went on to further state that ²the law is clear and uniform; shareholders cannot sue for injuries arising from the diminution in value of their shareholders resulting from wrongs allegedly done to their corporation. Nor can stockholders assert individual claims for wages or other lost income lost because of injuries assertedly done to their corporations.² *Id.*

In the case at bar, the Plaintiffs have improperly attempted to convert their alleged damages to personal claims by replacing the word ²Plaintiffs² for ²Fort Lee Bank² in the Complaint. The essence of the Complaint is that Alma Bank caused injury to Fort Lee Bank by misrepresenting to Fort Lee Bank its intentions to consummate the merger. The prospective economic benefits that Plaintiffs claim they would have received from a successful transaction with another potential investor are similarly damages that were suffered by Fort Lee Bank, not to the shareholders individually.

Furthermore, the Plaintiffs, who are collectively less than 50% of the shareholders, have not alleged that they have suffered any special injuries that were not suffered by all other shareholders of Fort Lee Bank. The Plaintiffs strongly contend that they have suffered special injuries, however, they have not pled with any specificity what these alleged special injuries might be. The type of damages that the Plaintiffs are claiming are covered by the holdings of *Strasenburgh* and *Pepe*, which have been characterized as the loss of ownership and other significant financial interests in Fort Lee Bank. The loss asserted is plainly translated as meaning the loss of a shareholders' investment in the Bank.

That loss of share value is by definition suffered by all shareholders alike and is not a unique harm suffered by just the Plaintiffs. In support of the Plaintiffs argument that the injuries alleged constitute special injuries to afford the Plaintiffs standing, the Plaintiffs attempt to turn to Delaware case law. The Plaintiffs heavily cite *Lipton v. News International, 514 A.2d 1075 (Del. 1986)*, which this Court does not find to be applicable to the situation at hand. In *Lipton*, the Court found that there were special injuries because the shareholder's contractual voting rights were violated. The Court held that contractual voting rights are independent from the rights of the corporation, and therefore a violation would be a special injury. In the instant matter, the Plaintiffs do not have any contractual rights that were violated to give rise to a special injury. The Plaintiffs argument that the fact that the Defendants actions harmed Fort Lee Bank does not bar an individual claim, is a misconception of the standing precedent. The Plaintiffs must have been able to allege a special injury caused to them individually in order to bring claims against the Defendants. The Plaintiffs have failed in this regard. The alleged special injuries are not independent of the damages alleged to have been suffered by Fort Lee Bank, but rather are derivative of the Defendants purported

misconduct. As such, the Plaintiffs do not have the requisite standing to bring a claim as individual shareholders against the Defendants.

The Plaintiffs also misplace reliance on the Appellate Division decision in *Brown v. Brown, 323 N.J. Super. 30, 731 A.2d 1212 (App. Div. 1999)*. In *Brown*, a husband and wife were shareholders in a closely held corporation. During the pendency of their divorce, the wife brought a suit against her former husband and the company alleging breach of fiduciary duties. As part of the divorce settlement, the former husband gained complete control of the corporation.

On appeal the Appellate Division decided not to follow the Massachusetts' rule that derivative actions become direct actions in closely held corporations. Rather, the Appellate Division allowed the former wife to continue her suit relying on a flexible approach to American Law Institute's Principals of Corporate Governance: Analysis and Recommendations (1992) Section 7.01. The Court held that there was no risk of multiple suits, the corporation would have enough assets to cover liabilities, and there was no chance of unfair distribution because there was now only one shareholder. *Id. at 38*. The *Brown* case is distinguishable from the matter at hand. In this instant litigation the former shareholders are not bringing a suit against their ²own closely held² corporation. Rather, the former shareholders are attempting to step into the shoes of the corporation, in spite of its separate existence, and bring a suit directly against the Defendants. As it has been previously discussed, the minority shareholders cannot bring a suit against the Defendants for damages suffered by Fort Lee Bank. The corporation, Fort Lee Bank, is the entity that would have standing against the Defendants, not the former shareholders.

Based upon the foregoing reasons, the Defendants' Motions to Dismiss are GRANTED.