THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

LINDA MARUCCI, et al.,	:	November Term, 2001
Plaintiffs	:	
	:	No. 391
v.	:	
	:	Commerce Case Program
SOUTHWARK REALTY CO., et al.,	:	
Defendant	:	Control No. 032062

OPINION

Defendants Southwark Realty Co. ("Southwark") and Craig Smith ("Smith") have filed a motion for summary judgment ("Motion") on the sole claim set forth in the complaint ("Complaint") of Plaintiffs Linda Marucci, Mary A. Futcher, John McGill, Patrick Loynd, Lorraine Papplardo, David Zuy and Barbara McKenzie. For the reasons set forth in this Opinion, the Motion is granted.

BACKGROUND

The Plaintiffs are members of the Monroe Court Homeowners Association ("MCHA"), a Pennsylvania non-profit corporation registered in 1981. MCHA's purpose was to own and to maintain a courtyard located at the rear of 228-238 Monroe Street and 233-239 Fitzwater Street ("Courtyard"). Each of the Plaintiffs owns a condominium[1] along Monroe Street and came to own his

[1] The condominium association of which the Plaintiffs are members is referred to as the "Condominium."

or her interest in MCHA individually through his or her Condominium membership.[2] Smith has served as a director of MCHA and owns, along with his wife, 38.75 percent of MCHA.

Through 1991, MCHA hired Southwark, a corporation owned by Smith, to care for the Courtyard and to assist in MCHA's operations. The Defendants assert that MCHA terminated its relationship with and ceased paying Southwark in 1992, although the Plaintiffs contend that the relationship between MCHA and Southwark ran until 1999. The Defendants further claim that they paid the real estate taxes on the Courtyard between 1991 and 1996 because MCHA did not do so.

In April 1999, Smith contacted John Solether, who was then President of MCHA, to request reimbursement for the real estate taxes ("Taxes") allegedly paid by Southwark. MCHA and Southwark were unable to come to an arrangement regarding the Taxes, and Smith instituted suit against MCHA ("1999 Suit"). Although MCHA and Southwark met several times in an attempt to work out their differences, no solution was found, and a default judgment ("Judgment") was entered against MCHA in the amount of $10,048.50 on October 26, 1999.

When MCHA failed to pay the Judgment, Southwark filed a writ of execution and caused the Courtyard to be placed on the sheriff sale list for February 6, 2001. The Parties contest whether the notice required by Pennsylvania Rule of Civil Procedure 3129.2 was ever sent to or received by the Plaintiffs,[3] although a representative of the Condominium members subsequently contacted Defendants'

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[2] Fifty percent of the interests in MCHA was distributed among all Condominium members in proportion to their respective common area interests. The Plaintiffs represent less than all of the Condominium members and less than half of the interests in MCHA.

[3] It is difficult to overstress the importance of proper notice in this context:

The deprivation of a property right by adjudication must be preceded by notice and an

counsel to discuss a settlement. When these discussions fell through, the Courtyard was sold to Richard D. Malmed, the attorney on the writ of execution, on February 6, 2001. The Plaintiffs contend that this transaction and the events leading up to it were tainted with fraud and breaches of Smith's obligations to MCHA.

The Plaintiffs initiated the instant action on November 7, 2001 and have requested that the Court set aside the sale of the Courtyard and restore title to MCHA. The Defendants have filed the Motion, arguing that the doctrines of res judicata, collateral estoppel and laches bar the Plaintiffs from proceeding and that the Plaintiffs are improper parties to this action.

DISCUSSION

The doctrines of res judicata, collateral estoppel and laches do not apply to the Plaintiffs' claim. However, the fact that the Plaintiffs have brought this action as individuals dooms their efforts to obtain relief and requires that the Court grant the Motion.

I. The Plaintiffs' Claim Is Not Barred by Either Res Judicata or Collateral Estoppel

In Pennsylvania, the doctrine of res judicata is applied as follows:

> Pursuant to the doctrine of res judicata, a final judgment on the merits by a court of competent jurisdiction will bar any future suit between the parties or their privies in connection with the same cause of action. The purposes behind

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> opportunity to be heard. Otherwise it is a deprivation of property without due process of law. It is the notice which is indispensable to due process. Whatever mechanism is used, it must be reasonably calculated to apprise the interested parties of the pendency of the action and to afford them the opportunity to present their objections. This is why strict compliance with the formal notice requirement is required.

First E. Bank v. The Campstead, Inc., 432 Pa. Super. 241, 246, 637 A.2d 1364, 1366 (citations and brackets omitted).

> the doctrine, which bars the relitigation of issues that either were raised or could have been raised in the prior proceeding, are to conserve limited judicial resources, establish certainty and respect for court judgments, and protect the party relying upon the judgment from vexatious litigation. In keeping with these purposes, the doctrine must be liberally construed and applied without technical restriction. Furthermore, we note that the application of res judicata requires the concurrence of four conditions between the present and prior actions: 1) identity of issues; 2) identity of causes of action; 3) identity of parties or their privies; and 4) identity of the quality or capacity of the parties suing or being sued.

Yamulla Trucking & Excavating Co. v. Justofin, 771 A.2d 782, 784 (Pa. Super. Ct. 2001) (citations omitted). See also Chada v. Chada, 756 A.2d 39, 43-44 (Pa. Super. Ct. 2000) ("When the cause of action in the first and second actions are distinct, or, even though related, are not so closely related that matters essential to recovery in the second action have been determined in the first action, the doctrine of res judicata does not apply.").

Similarly, the doctrine of collateral estoppel, also known as claim preclusion, "operates to prevent a question of law or issue of fact which has once been litigated and fully determined in a court of competent jurisdiction from being relitigated in a subsequent suit." Spisak v. Margolis Edelstein, 768 A.2d 874, 876-77 (Pa. Super. Ct. 2001) (quoting Incollingo v. Maurer, 394 Pa. Super. 352, 356, 575 939, 940 (1990)). The doctrine requires the satisfaction of four elements:

> Collateral estoppel applies when the issue decided in the prior adjudication was identical with the one presented in the later action, there was a final judgment on the merits, the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in the prior adjudication.

In re Iulo, 564 Pa. 205, 210, 766 A.2d 335, 337 (2001) (citing Safeguard Mut. Ins. Co. v. Williams, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975)). Thus, for either doctrine to apply, the issues presented in both cases must be identical.

In the instant matter, it is clear that this requirement is not met. While it may be said that there was an adjudication as to MCHA's liability to Southwark for amounts owed, the earlier action did not address the Defendants' alleged failure to comply with the notice requirements for the sale of the Courtyard or Smith's alleged fraud and breach of fiduciary duty. Thus, while the Plaintiffs' right to challenge the amounts claimed by the Defendants may be limited,[4] they may contest the manner in which the Courtyard was sold.

II. The Doctrine of Laches Does Not Bar the Plaintiffs' Claim

As stated by the Pennsylvania Supreme Court, "[l]aches is an equitable doctrine which precludes a party from pursuing a complaint when it is guilty of a lack of diligence in asserting its rights, such that the passage of time has caused prejudice to the opposing party." In re Iulo, 564 Pa. at 211, 766 A.2d at 338 (citing Stilp v. Hafer, 553 Pa. 128, 718 A.2d 290 (1998)). Furthermore, "[t]he question of laches is factual and to be determined by an examination of the circumstances." Siegel v. Engstrom, 427 Pa. 381, 386, 235 A.2d 365, 368 (1967) (citing Mulholland v. Pittsburgh Nat'l Bank,

[4] In the event that the Plaintiffs sought relief within the scope of the matters addressed in the 1999 Suit, it is likely that they will be seen as being in privity with MCHA. See Denckla v. Maes, 313 F. Supp. 515, 520 (E.D. Pa. 1970) (holding that members of non-profit corporation were in privity with corporation for res judicata purposes). Cf. Bush v. Eastern Uniform Co., 356 Pa. 298, 301, 51 A.2d 731, 732 (1947) (holding that claims brought against a for-profit corporation "are conclusive and res judicata as to the shareholders" because "[a] shareholder is deemed privy to proceedings touching the corporation of which he is a member").

418 Pa. 96, 202 A.2d 857 (1965)). See also Warner v. Warner, 184 Pa. Super. 327, 134 A.2d 242, 244 (Laches "will not be invoked for the mere passage of time. Where the passage of time in itself would not injure the rights and interests of the party seeking to invoke the doctrine, it will not be invoked without considering all the facts and circumstances surrounding the case.").

Here, the sale of the Courtyard took place on February 6, 2001, and the Plaintiffs commenced this action on November 7, 2001, a delay of nine months. There is no indication of that this delay was unreasonable or that the Defendants have suffered prejudice. Accordingly, the portion of the Motion asserting laches is without merit.

III. The Plaintiffs Cannot Bring this Action as Individual Members

As a last point, the Defendants assert that the Plaintiffs, as representatives of less than a majority of the interests in MCHA, do not have standing to bring an action on behalf of MCHA.[5] Because the Plaintiffs suffered only indirect harm through MCHA's loss of the Courtyard, their grievances are properly addressed in a derivative action suit, and their direct action presented here must be dismissed.

As an initial matter, the Plaintiffs assert that Pennsylvania statutes on condominium associations ("Condominium Code")[6] govern the instant dispute. This is in error. The Condominium Code "applies to all condominiums created within this Commonwealth" after July 2, 1980. However, the Plaintiffs are

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[5] Although the Defendants' memorandum does not explicitly speak to the limitations on direct actions by shareholders, the sum of the Defendants' argument is that the Plaintiffs have not suffered a direct injury, and the Defendants rely on cases addressing direct actions. Accordingly, the Court will focus its attention on whether the Plaintiffs have standing to bring a direct action.

[6] 68 Pa. C.S. §§ 3101-3414.

not bringing this action as members of the Condominium or even to enforce the Condominium's rights. Indeed, the Plaintiffs themselves state that "[t]he present case involves individual claims by association members who suffered a loss of property rights in the Courtyard as a result of the Defendants' misconduct." Pl. Mem. 10 (capitalization omitted). Moreover, MCHA is a non-profit corporation, not a condominium. The fact that the Plaintiffs acquired their interests in MCHA because they were Condominium members is not relevant, and there is no reason that the Condominium Code sections cited by the Plaintiffs apply to this matter.

Instead, this controversy, which centers on the Plaintiffs, their interest in MCHA and MCHA's relationship with the Defendants, is governed by Pennsylvania statutes on non-profit corporations, as MCHA is a Pennsylvania non-profit corporation. 15 Pa. C.S. § 5102(a). These statutes define a derivative action as an "action or proceeding brought to enforce a secondary right on the part of one or more shareholders of a business corporation against any present or former officer or director of the corporation because the corporation refuses to enforce rights that may properly be asserted by it." 15 Pa. C.S. § 5782(a). See also Pa. R. Civ. P. 1506(a) (A derivative action is one brought "to enforce a secondary right brought by one or more stockholders or members of a corporation or similar entity because the corporation or entity refuses or fails to enforce rights which could be asserted by it.").

There are few cases addressing derivative actions in a non-profit context in any regard, and none addressing when an action must be brought as a derivative action and when it may be brought by a non-profit corporation member acting in an individual capacity. However, the question as to direct

and derivative actions has been explored in depth for business corporations.[7] The Third Circuit has distinguished between a derivative action and an individual action as follows:

> It is hornbook law that claims asserted for the benefit of stockholders qua stockholders in a corporation because of the tortious acts of its officers or those actions in conjunction with them is a class suit, a derivative action, and recovery is for the benefit of the corporation directly and indirectly to its stockholders. It is equally clear that where a corporation, tortiously conspires with others to damage an individual and does so a cause of action arises which belongs to the individual.

Davis v. U.S. Gypsum Co., 451 F.2d 659, 662 (3rd Cir.1971). Pennsylvania corporate law scholars have also recognized this distinction:

> Where there is a breach of the contract existing between the corporation and a shareholder by reason of his status as a shareholder, as distinguished from a breach of a contract between the corporation and a third person; or where there is a breach of the fiduciary duty which the directors, officers, or majority shareholders owe to a shareholder or the minority shareholders, as such, as distinguished from the breach of such a duty owed to the corporation, the shareholder injury by such breach has a direct, personal cause of action.

W. Edward Sell & William H. Clark, Jr., Pennsylvania Business Corporations (1997) § 1782.2. See also William M. Fletcher, 12B Cyclopedia of the Law of Private Corporations ("Fletcher") § 5911 ("If the injury is one to the plaintiff as a shareholder as an individual, and not to the corporation, as where the action is based on a contract to which the shareholder is a party, . . . it is an individual action."). Thus, an injury to a corporation that results in injury to the corporation's shareholders "is regarded as

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[7] The Court believes the law on business corporations is persuasive in this regard. First, Pennsylvania Rule of Civil Procedure 1506, which addresses derivative actions, applies to action by "stockholders or members of a corporation," implying that the rule extends to actions by a non-profit corporation member. In addition, the statutes on derivative actions for non-profit corporations and business corporations are substantially identical. Compare 15 Pa. C.S. § 5782 with 15 Pa. C.S. § 1782.

'indirect,' and insufficient to give rise to a direct cause of action by the stockholder" and generally requires that the action be brought on behalf of the corporation. Burdon v. Erskin, 264 Pa. Super. 584, 586, 401 A.2d 369, 370 (1979) (citing Kelly v. Thomas, 234 Pa. 419, 428, 83 A. 307 (1912)). See also John L. Motley Assocs., Inc. v. Rumbaugh, 104 B.R. 683, 686 (E.D. Pa.1989) ("An action to redress injuries to a corporation cannot be maintained by a shareholder in his own name but must be brought in the name of the corporation."); Kehr Packages, Inc. v. Fidelity Bank, Nat'l Ass'n, 710 A.2d 1169, 1176 (Pa. Super. Ct. 1998) ("[W]here the gravamen of a claim is injury to a corporation, the shareholders of the corporation may not claim injury to themselves rather than the corporation.").

In this action, the Plaintiffs assert that they are suing for the harm they, as individuals, suffered due to the Defendants' sale of the Courtyard. However, any harm to the Plaintiffs came about through damage incurred by MCHA and was suffered by all members: Smith's alleged breach of fiduciary duty and the Defendants' failure to comply with the notice requirements for the sale of the Courtyard resulted in MCHA losing its interest in the Courtyard. Because the harm to the Plaintiffs was indirect, their claim is properly brought as a derivative action.[8]

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[8] Both this Court and the Third Circuit have recognized that, under certain circumstances, an action that would be classified as derivative in nature may be pursued as a direct action. See Warden v. McLelland, No. 00-1364, 2002 WL 800407, at *5 (3d Cir. Apr. 30, 2002) (predicting Pennsylvania Supreme Court adoption of adopting ALI Principles § 7.01(d), under which a court has the discretion to 'treat an action raising derivative claims as a direct action' if doing so 'will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons'); Liss v. Liss, No. 2063, 2002 WL 576510 (Pa. Com. Pl. Mar.22, 2002) (applying section 7.01(d)); Baron v. Pritzker, 52 Pa. D. & C.4th 14, 26-27 (2001) (excusing demand by treating corporate waste claim as individual one); Levin v. Schiffman, 54 Pa. D. & C.4th 152, 167 (2000) (adopting section 7.01(d) and exercising its discretion to treat derivative claims as direct). Cf. Audio Visual Xperts, Inc. v. Walker, No. 17261-NC, 2000 WL 222152, at *2 (Del. Ch. Feb. 18,

CONCLUSION

Although their claim is not barred by collateral estoppel, res judicata or laches, the Plaintiffs have been injured only as members of MCHA and thus may not bring the instant action in an individual capacity. As such, the Motion is granted.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: May 15, 2002

2000) (predicting that Pennsylvania Supreme Court would adopt section 7.01(d)). However, there is no indication that circumstances justifying such treatment are present here, and the Plaintiffs have not argued that any exceptions to this principle apply. Cf. Mogilyansky v. Sych, No. 3709, 2002 WL 372950, at *1 n.2 (Pa. Com. Pl. Feb. 4, 2002) (declining to apply section 7.01(d) where plaintiff made no attempt to invoke this the section, there was no indication that the conditions for allowing a direct action were met and the circumstances did not convince the court to exercise its discretionary authority to allow a direct action). Had the Plaintiffs alleged such conditions, they might be able to proceed in their individual capacities, but for the Court to reach such a decision based on what is currently before it would be inappropriate.

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Plaintiffs	:	
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v.	:	
	:	Commerce Case Program
SOUTHWARK REALTY CO., et al.,	:	
Defendant	:	Control No. 032062

ORDER

AND NOW, this 15th day of May, 2002, upon consideration of the Motion for Summary Judgment of Defendants Southwark Realty Co. and Craig Smith, the response thereto of Plaintiffs Linda Marucci, Mary A. Futcher, John McGill, Patrick Loynd, Lorraine Papplardo, David Zuy and Barbara McKenzie, and all other matters of record, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Motion is GRANTED.

BY THE COURT:

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JOHN W. HERRON, J.