

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

ALEXANDER MOGILYANSKY,	:	June Term, 2000
Plaintiff	:	
	:	No. 3709
v.	:	
	:	Commerce Case Program
SVETLANA SYCH, et al.,	:	
Defendants	:	Control No. 121317

OPINION

Defendants Svetlana Sych (“Svetlana”), Yvegeny Sych (“Yvegeny”) and Russian Market, Inc. (“Market”) have filed a motion for summary judgment (“Motion”), requesting that the Court dismiss certain counts in the amended complaint (“Complaint”) of Plaintiff Alexander Mogilyansky (“Mogilyansky”). Mogilyansky concedes that summary judgment is appropriate on each of the challenged Counts except for Count IV - Constructive Trust. For the reasons set forth in this Opinion, the Court agrees with the Defendants and grants summary judgment on Count IV.

BACKGROUND

The background to this matter is set forth in greater detail in the Court’s opinion dated April 30, 2001.¹ In short, Mogilyansky and Svetlana established Market and published a newspaper called Russian Market. A dispute broke out between the Parties in December 1997, when Svetlana allegedly took funds belonging to Market and used them, in part, to purchase a house for herself and Yvegeny. Mogilyansky subsequently filed the instant action, which asserts, among other claims in his amended

¹ Available at <http://courts.phila.gov/cptcvcomp.htm>.

complaint (“Complaint”), a count on behalf of himself as an individual against Svetlana and Yvegeny for a constructive trust based on their alleged diversion of Market funds. As relief in this Count, Mogilyansky has requested that Svetlana and Yvegeny be enjoined from further appropriations from Market, be declared to hold all diverted funds as trustee for either Mogilyansky or Market, and return all diverted funds to Mogilyansky or Market. Nowhere in the Complaint or in any other document submitted to the Court has Market been listed as a plaintiff in this matter.

In the Motion, the Defendants assert that Count IV - Constructive Trust is properly treated as an individual conversion claim and that the two-year statute of limitations requires the Court’s dismissal. Mogilyansky counters that Count IV is really a derivative action on behalf of Market and that this claim is not barred by the statute of limitations.

DISCUSSION

Pennsylvania Rule of Civil Procedure 1035.2 allows a court to enter summary judgment “whenever there is no genuine issue of any material fact as to a necessary element of the cause of action.” A court must grant a motion for summary judgment when a non-moving party fails to “adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor.” Ertel v. Patriot-News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996).

Pennsylvania law defines a shareholder’s 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. § 1782(a). See also Pa. R. Civ. P. 1506(a)

(A shareholder’s 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.”). Thus, when an injury to a corporation results in injury to the corporation’s shareholders, it “is regarded as ‘indirect,’ and insufficient to give rise to a direct cause of action by the stockholder,” requiring 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.”).²

² On at least two occasions, this Court has held that under certain limited conditions, Pennsylvania law affords a court the discretion to permit a close corporation shareholder to bring what would otherwise be a derivative action as a direct action. See Baron v. Pritzker, 52 Pa. D. & C.4th 14, 26 (2001) (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”); Levin v. Schiffman, July Term, 2000, No. 4442, slip op. at 12-14 (C.P. Phila. Feb. 1, 2001) (Sheppard, J.) (applying ALI Principles § 7.01(d) to plaintiff’s action) (available at <http://courts.phila.gov/cptcvcomp.htm>). Here, however, Mogilyansky has made no attempt to invoke this holding, there is no indication that the conditions for allowing a direct action have been met and the circumstances surrounding this case do not convince the Court to exercise its discretionary authority to allow Mogilyansky to proceed as an individual in a direct action.

In Davis v. U.S. Gypsum Co., 451 F.2d 659 (3rd Cir. 1971), the Third Circuit 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.

451 F.2d at 662. Pennsylvania corporate commentators also recognize 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.”).

In some ways, Count IV bears remarkable similarity to a derivative action. Indeed, Mogilyansky claims that Count IV is intended to be a derivative action even though it is titled as an individual claim. He highlights the repeated references to relief requested for Market as well as Mogilyansky and argues that “Count IV may have been more artfully drawn, but examining it in the light most favorable to the Plaintiff, it sets forth a derivative action.” Pl.’s Resp. ¶ III.C.

However, these similarities and characteristics are not enough to allow the Court to treat Count IV as a derivative action. It is required that a plaintiff plead “each cause of action against each

defendant in a separate count under a separate heading.” Goodrich Amram § 1020(a):5. While a count must include the facts upon which a plaintiff’s claim is based, “a plaintiff is not obliged to identify the legal theory underlying his complaint,” and there is no requirement that the title of a given count include the specific cause of action alleged thereunder. Weiss v. Equibank, 313 Pa. Super. 446, 453, 460 A.2d 271, 275 (1983). See also Gavula v. ARA Servs., Inc., 756 A.2d 17, 22 (Pa. Super. Ct. 2000) (Even though the relevant counts were not specifically identified as “negligence” counts in plaintiff’s complaint, those counts “clearly intended to be a claim for negligence” were to be treated as such.); McClellan v. Health Maint. Org. of Pa., 413 Pa. Super. 128, 142, 604 A.2d 1053, 1060 (1992) (“The obligation to discover the cause or causes of actions is on the court: the plaintiff need not identify them.”); Goodrich Amram § 1020(a):2 (“Each count should open with a heading First count, Second count, etc.”). Indeed, Pennsylvania courts faced with a conflict between the allegations of a count and the count’s title look at the allegations and not the title. See, e.g., Zernhelt v. Lehigh County Office of Children and Youth Servs., 659 A.2d 89 (Pa. Commw. Ct. 1995) (treating a count titled “negligent infliction of emotional distress” as a claim for intentional infliction of emotional distress); Maute v. Frank, 441 Pa. Super. 401, 403-04, 657 A.2d 985, 986 (1995) (“Since the complaint states a viable mandamus claim, we will treat that portion of the action as such, regardless of the fact that the complaint is not titled properly as one involving mandamus.”).

That said, Mogilyansky’s request that the Court ignore not just the cause of action set forth in the title of Count IV but also the name of the plaintiff set forth in the title and in the Complaint as a whole goes a bit too far. It is one thing to ask that the Court use its expertise to determine what claim is being asserted, especially at the pleading stage; it is another to request that a court effectively allow a

substitution of parties by ignoring the name of the sole plaintiff in the matter and reasoning that the plaintiff meant to include a non-party as a plaintiff.

This conclusion is particularly sensible here for several reasons. As an initial matter, Market is not, and has never been, listed as a plaintiff in this action, a fact that would make inserting Market into Count IV even more of a surprise to the Defendants. In addition, Mogilyansky previously consented to the dismissal of Count V, titled as a shareholders' derivative action, implying that Count IV is distinct from a derivative action and that Mogilyansky had no grounds to pursue a derivative action. Last, this matter is slated for trial within the next two months, which makes Mogilyansky's request even more inappropriate. For these reasons, the Court will not treat Count IV as a derivative action.

Because Count IV is not a derivative action subject to a six-year statute of limitations,³ the Court must treat it as the individual claim that Mogilyansky has in fact raised. The Defendants contend that Count IV is, in effect, a conversion claim that is barred by Pennsylvania's two-year statute of limitations,⁴ and the Court agrees. Count IV focuses on the Sych's appropriation of funds from Market and their use of such funds for their personal benefit, allegations which support a conversion claim.⁵ A

³ A six-year statute of limitations is applicable to shareholder derivative actions. Johns v. Estate of Cheeseman, 457 Pa. 414, 322 A.2d 648 (1974).

⁴ The Defendants also argue that Count IV could be a breach of fiduciary duty claim. Svetlana, as a director of Market, owed Market a fiduciary duty. 15 Pa. C.S. § 1712(a) (stating that a director "stand[s] in a fiduciary relation to the corporation"). However, the Count is presented against both Syches, and there is no justification for finding that Yvegeny owed either Market or Mogilyansky a fiduciary duty.

⁵ Pennsylvania law defines conversion as "the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification." Paves v. Corson, 765 A.2d 1128, 1134 (Pa. Super. Ct. 2000) (quoting Brinich v. Jencka, 757 A.2d 388, 403 (Pa. Super. Ct. 2000)). Money may be the subject of a claim for conversion. McKeeman v.

conversion claim, in turn, is subject to a two-year statute of limitations. Bednar v. Marino, 435 Pa. Super. 417, 424, 646 A.2d 573, 577. In this instance, the most recent transaction that Mogilyansky claims was improper took place in March 1998, and this action was not instituted until June 29, 2000, three months after the statute of limitations expired. Moreover, Mogilyansky does not plead any facts that would justify tolling the statute or invoking the discovery rule. As such, Count IV is barred by the statute of limitations, and summary judgment is granted on Count IV in favor of the Defendants. See Bradley v. Ragheb, 429 Pa. Super. 616, 620, 633 A.2d 192, 194 (1993) (Where a party's claim is barred by the statute of limitations, a court may enter summary judgment.).

CONCLUSION

In addition to the Counts on which the Parties have agreed to summary judgment, the Defendants are entitled to summary judgment on Count IV.

BY THE COURT:

JOHN W. HERRON, J.

Date: February 4, 2002

CoreStates Bank, N.A., 751 A.2d 655, 659 n.3 (Pa. Super. Ct. 2000) (citing Shonberger v. Oswell, 365 Pa. Super. 481, 485, 530 A.2d 112, 114 (1987)).

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Plaintiff	:	
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	:	Commerce Case Program
SVETLANA SYCH, et al.,	:	
Defendants	:	Control No. 121317

ORDER

AND NOW, this 4th day of February, 2002, upon consideration of the Motion for Summary Judgment of Defendants Svetlana Sych, Yvegeny Sych and Russian Market, Inc. and Plaintiff Alexander Mogilyansky's response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Motion is GRANTED as follows:

1. Count I - Possession of Shares, Count III - Judicial Supervision of Corporate Election and Count IV - Constructive Trust are DISMISSED.
2. The relief requested in Count II - Action for Accounting is limited to the Plaintiff's request for an Order compelling the Defendants to furnish copies of all corporate records to the Plaintiff.

BY THE COURT:

JOHN W. HERRON, J.