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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ALAN R. NOCITA et al.,

Plaintiffs and Appellants,

v.

LESLIE J. KRENK,

Defendant and Respondent.

B231631

(Los Angeles County Super. Ct.
No. GC042872)

APPEAL from a judgment of the Superior Court of Los Angeles County, C.
Edward Simpson, Judge. Affirmed.

Dewitt, Algorri & Algorri, Ernest P. Algorri and Patrick Nolan for Plaintiffs and
Appellants.

No appearance for Defendant and Respondent.

Plaintiffs and appellants Alan and Deborah Nocita appeal from a judgment following an order granting summary judgment in favor of defendant and respondent Leslie Krenk in this action concerning a director's fiduciary duties.¹ The Nocitas contend that Krenk owed them a fiduciary duty as shareholders of Healthy Drugstore, Inc. (HDI), which he breached in numerous ways. Krenk has not filed a brief on appeal.² We conclude the Nocitas have not alleged the breach of a duty giving rise to an individual action, and therefore, we affirm.

FACTS

Krenk has owned and operated a successful pharmacy in Maui for more than 30 years. He married Candyce in 1996. HDI was incorporated in Nevada to sell nutritional supplements online in 1999. Robert Hooper served as president, Krenk served as secretary, and two individuals served as directors. The other individuals had left the company by 2001.

Hooper met Deborah in 2001. They formed a company which was eventually consolidated with HDI. In October 2002, HDI's board of directors consisted of the Krenks and the Hoopers. The board approved Deborah as a board member and authorized distribution of HDI's shares such that the Krenks, the Hoopers, and Deborah each received an equal interest. The Nocitas invested money in HDI.

In January 2004, HDI's board discussed opening retail pharmacy locations in Colorado. Hooper and Krenk developed a business plan. On July 30, 2004, Alan was appointed as a board member.

¹ Because the Nocitas share one last name, they will be referred to individually by their first names for ease of reference.

² Krenk's attorney filed a motion in this court to be relieved as Krenk's counsel in this matter. He had sent multiple substitution of attorney requests to Krenk's address without receiving any answer. This court granted the motion to relieve his attorney, and Krenk did not file a respondent's brief on appeal.

Krenk was the only director with a pharmacist license and knowledge, training, and experience in pharmacy-based patient management systems. HDI did not pay Krenk a salary. He established a residence in Colorado. In October 2004, HDI opened a retail pharmacy in Pagosa Springs, Colorado. In January 2005, HDI opened a store in Durango, Colorado. Krenk trained pharmacist Richard Ruble, who took over management of the Durango store on January 24, 2005.

Krenk and Hooper had a falling out. Hooper resigned as president of HDI on February 28, 2005. In April 2005, Krenk went to Maui. He did not return to Colorado. Krenk claims to have resigned as a director of HDI in April 2005, although the Nocitas claim not to have received notice of his resignation. The board of directors no longer had a licensed pharmacist with the requisite knowledge and skill to operate a pharmacy or train pharmacists. In July 2005, Krenk filed for dissolution of his marriage.

In August 2005, the Colorado State Board of Pharmacy audited the Durango store and found errors in inventory records. HDI was fined \$5,000 and placed on probation for two years.

In January 2006, the Hoopers sold their interest in HDI to the Nocitas. Dissolution of the Krenks' marriage was entered in April 2006. In the Krenks' property settlement, Candyce was awarded all of the Krenks' interest in HDI.

PROCEDURAL BACKGROUND

On April 29, 2009, the Nocitas filed a complaint against Krenk for breach of contract and breach of fiduciary duty. With respect to the cause of action for breach of fiduciary duty, the complaint alleged that the Nocitas invested \$500,000 in capital in HDI. Krenk failed to fulfill his duty as an officer and director of HDI to provide licensing, expertise, staffing, knowledge, and business connections that he promised to provide and which were necessary for the enterprise to succeed. Instead, Krenk abandoned the Nocitas and abdicated his role in the business, leaving the Nocitas to struggle to continue without him and ultimately resulting in the loss of their investment.

On August 16, 2010, Krenk filed a motion for summary judgment. Among other issues, he argued that leaving his position as a corporate officer and director did not constitute a breach of any fiduciary duty. The Nocitas' opposed the motion. With respect to the cause of action for breach of fiduciary duty, the Nocitas argued that Krenk had a fiduciary duty to the corporation and its shareholders under Corporations Code section 309, subdivision (a), which included a duty of care and a duty of loyalty. They argued that Krenk breached his duty of care by failing to follow regulatory codes properly and failing to train Ruble properly. He breached his duty of loyalty by forcing Hooper out of the organization, which caused HDI to lose Hooper's business and managerial skills, and by abandoning HDI without proper notice, leaving HDI without an internal licensed pharmacist, which made it difficult for the remaining directors to manage the retail stores. Krenk filed a reply.

After a hearing, the trial court granted the motion for summary judgment on December 7, 2010. The court found that no written contract had been identified and Krenk did not owe a fiduciary duty to HDI's shareholders. The court entered judgment in favor of Krenk on January 26, 2011. The Nocitas filed a timely notice of appeal.

DISCUSSION

Standard of Review

“A trial court will grant summary judgment where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant moving for summary judgment must prove the action has no merit. This is done by showing one or more elements of plaintiff's cause of action cannot be established or that there is a complete defense to the cause of action. Plaintiff then bears the burden of showing a triable issue of material fact exists as to that cause of action or defense. (Code Civ. Proc., § 437c, subds. (c), (o)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 849–850.)” (*Hennigan v. White* (2011) 199 Cal.App.4th 395, 401.)

“On appeal, we exercise our independent judgment. [Citation.] In determining whether there is a triable issue of material fact, we consider all the evidence set forth by the parties except that to which objections have been made and properly sustained. (Code Civ. Proc., § 437c, subd. (c); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We resolve evidentiary conflicts, doubts, or ambiguities in the opposing party’s favor. [Citation.]” (*Hennigan v. White, supra*, 199 Cal.App.4th at pp. 401-402.)

Fiduciary Duty

The Nocitas contend that Krenk abandoned his fiduciary duties, resulting in the loss of their investment in HDI. However, we conclude the Nocitas have not alleged a breach of any fiduciary duty owed to them as individuals under California law.³

“It is without dispute that in California, corporate directors owe a fiduciary duty to the corporation and its shareholders and now as set out by statute, must serve ‘in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders.’ (Corp. Code, § 309, subd. (a).)[⁴] This duty—generally to act with honesty, loyalty, and good faith—derived from the common law. (*Lehman v. Superior Court* (2006) 145 Cal.App.4th 109, 120–121 [director’s fiduciary duty is not liability created by statute]; *Jones v. H. F. Ahmanson & Co.* [(1969)] 1 Cal.3d [93,] 106–110

³ It is not clear from the record that Krenk’s duties as a director of HDI were governed by California law. However, the parties have relied on California law in the trial court and on appeal. Therefore, we analyze the issue under California law.

⁴ “Corporations Code section 309, subdivision (a) provides that ‘[a] director shall perform the duties of a director . . . in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.’ A director ‘who performs the duties of a director in accordance with’ this subdivision, as well as other subdivisions that permit reliance on information provided by others under certain circumstances not relevant here, ‘shall have no liability based upon any alleged failure to discharge the person’s obligations as a director.’ (Corp. Code, § 309, subd. (c).)”

[(*Jones*)] [discussing common law development of directors’ fiduciary duty]; cf. *Pittelman v. Pearce* (1992) 6 Cal.App.4th 1436, 1446–1447 [corporate bondholders, unlike shareholders, not owed fiduciary duty; obligations owing are defined by contractual terms of bond].)” (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1037.)

““[A] corporation which suffers damages through wrongdoing by its officers and directors must itself bring the action to recover the [resulting] losses . . . or if the corporation fails to bring an action, suit may be filed by a stockholder acting derivatively on behalf of the corporation. An individual [stockholder] may not maintain an action in his own right . . . for destruction or diminution in the value of the stock”

[Citation.]” (*PacLink Communications International, Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 965 (*PacLink*).) ““A shareholder’s derivative suit seeks to recover for the benefit of the corporation and its whole body of shareholders when injury is caused to the corporation “[T]he action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.”

[Citations.]”” (*Id.* at p. 964, quoting *Jones, supra*, 1 Cal.3d at pp. 106-107, italics omitted.) An action for depletion of a corporation’s assets caused by misfeasance or negligence of the managing officers of the corporation must be brought by the corporation and cannot be brought in a nonderivative action by a stockholder in his individual capacity. (*O’Hare v. Marine Electric Co.* (1964) 229 Cal.App.2d 33, 36.)

“In determining whether an individual action as opposed to a derivative action lies, courts look at ‘the gravamen of the wrong alleged in the pleadings.’ (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124 [(*Nelson*)).)” (*PacLink, supra*, 90 Cal.App.4th at p. 965.) “[A]n individual cause of action exists only if the damages were not *incidental* to an injury to the corporation. [Citation.]” (*Nelson, supra*, at p. 124.) “The cause of action is individual, not derivative, only ““where it appears that the injury resulted from the violation of some special duty owed the stockholder by the wrongdoer

and having its origin in circumstances independent of the plaintiff's status as a shareholder.” [Citation.]” (*Ibid.*) “In other words, it is the gravamen of the wrong alleged in the pleadings, not simply the resulting injury, which determines whether an individual action lies.” (*Ibid.*)

It is clear that the gravamen of the Nocitas' cause of action for breach of fiduciary duty is the injury done to the corporation by Krenk's abandonment of his position as director. Krenk's actions damaged HDI itself, and the Nocitas' losses were incidental to the failure to fulfill his obligations as a director of the corporation. Therefore, the gravamen of the wrong was the injury to HDI caused by Krenk's abandonment, which resulted incidentally in an injury to the Nocitas. We find that the gravamen of the complaint is injury to the whole business for which only a derivative action is allowed.

The Nocitas' reliance on *Jones, supra*, 1 Cal.3d 93, is misplaced. In *Jones*, the Supreme Court found a minority shareholder could maintain an individual action against a majority shareholder for breach of the majority shareholders' fiduciary duty to exercise control in an equitable manner. (*Id.* at p. 108.) In this case, Krenk was not a controlling shareholder and the Nocitas' action is not based on a fiduciary duty owed to them as minority shareholders. The trial court properly granted summary judgment in favor of Krenk.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.