STATE OF MICHIGAN

COURT OF APPEALS

RANDY IRISH,

Plaintiff-Appellant,

v

NATURAL GAS COMPRESSION SYSTEMS, INC., CRAIG ANDERSON, WILLIAM JENKINS, TRACY LARSEN, IAN PHAIR, MARK RITOLA, JAMES SANOR, RICHARD SHETERON, JAMES STRICKER, A.J. YUNCKER, and COLLEEN YUNCKER,

Defendants-Appellees.

UNPUBLISHED
July 18, 2006

No. 266021
Grand Traverse Circuit Court
LC No. 05-024788-CK

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7) (statute of limitations) and (8) (failure to state a claim). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was a founding director and stockholder in Natural Gas Compression Systems, Inc. (Natural Gas Compression) and owned 13.2 percent of its stock. In September 2002, a change in the capital structure of Natural Gas Compression was proposed that involved eliminating plaintiff as a shareholder by means of a "cash out" merger and merging NGCS, Inc., an independent corporation, into Natural Gas Compression. The merger provided that investors who had been terminated as directors or employees, of whom plaintiff appears to be the only one, were ineligible to receive stock in the surviving company and would receive $0.39 for each of their existing shares. This price was calculated as the average of the stock's (1) equity value of $0 per share, (2) price to book value of $1.59 per share, and (3) price to earnings value of $0.22. Non-terminated founding member shareholders received shares in the new corporation. The per-share liquidation preference for the stock in the new company was $14.63, which is the original subscription price paid by outside investors whose shares were converted into priority stock in the resulting corporation.

At the Natural Gas Compression's annual shareholder meeting on September 5, 2002, 84.7 percent of the eligible shares were voted in favor of the merger. Plaintiff claims that he did not receive notice of the meeting until after it occurred so that he was unable to vote his stock against the merger. However, plaintiff's 13.2 percent of the stock would not have altered the approval of the merger because the merger required only a 71 percent affirmative vote.

Under the terms of the merger documents, plaintiff's shares were canceled. On October 21, 2002, Natural Gas Compression mailed a check to plaintiff for his canceled shares based on the per share value of $0.39. On October 29, 2002, plaintiff returned the check, stating that he believed the company's actions were illegal and oppressive, and he intended to find legal representation to protect his rights. Natural Gas Compression sent the check back to plaintiff. Plaintiff's attorney then sent letters to Natural Gas Compression demanding that plaintiff be paid $14.63 per share for his canceled stock.

Natural Gas Compression's financial position improved after plaintiff was "squeezed out". Net profits before taxes for the year ending July 31, 2002, were $24,937. Net profits before taxes for the year ending July 31, 2005, were $3,471,761.

Plaintiff did not contact Natural Gas Compression again until he filed his complaint on August 24, 2005, which was two years and ten months after he rejected the check from Natural Gas Compression and retained counsel. In his complaint, plaintiff alleged a count of shareholder oppression under MCL 450.1489 and a count of breach of contract.

Defendants moved for summary disposition under MCR 2.116(C)(7) (statute of limitations) and MCR 2.116(C)(8) (failure to state a claim of shareholder oppression under MCL 450.1489). At the hearing on defendants' motion, the trial court found that a "squeeze-out" merger is lawful in Michigan, that plaintiff did not show that the merger violated any contractual relations, and that plaintiff's votes were effectively voted against the merger because the merger documents required only affirmative votes to pass. The court concluded that plaintiff had no standing to assert a claim for shareholder oppression under MCL 450.1489 because he was not a current shareholder and that after the merger plaintiff failed to exercise his exclusive appraisal remedy as a dissenting shareholder under MCL 450.1762 and MCL 450.1772. The trial court also concluded that plaintiff's claim was barred by the two-year limitation period under the discovery rule in MCL 450.1489(1)(f) because plaintiff did not sue defendants until August 24, 2005, two years and ten months after he knew, when he returned the check on October 29, 2002, that he had a claim against Natural Gas Compression.

Plaintiff appeals by right claiming that he timely and properly brought his claim under MCL 450.1489. We disagree.

This Court reviews de novo an appeal from an order granting summary disposition. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). The trial court did not err in concluding that plaintiff did not state a claim under MCL 450.1489 because plaintiff is not a shareholder and has no standing under MCL 450.1489 and because plaintiff's exclusive remedy is an appraisal action under MCL 450.1762(3) and MCL 450.1772.

MCL 450.1489(1) provides that "[a] shareholder may bring an action in the circuit court . . . to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." Under MCL 450.1109(1), a "shareholder" is a "person holding units of proprietary interest in a corporation." "Holding" is a present active participle, modifying shareholder and, accordingly, means a current shareholder, i.e., holding the shares in the present. Further, in *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 282; 649 NW2d 84 (2002), this Court stated that "plaintiffs in a § 489 suit may only be current shareholders." Because plaintiff's shares were canceled incident to the September 5, 2005 merger, plaintiff ceased being a shareholder and was not a current shareholder when he sued defendants on August 24, 2005. Therefore, plaintiff did not have standing to sue under MCL 450.1489.

Further, plaintiff was limited to an exclusive appraisal remedy for his claim that he received less than fair market value for his stock. Plaintiff had the right to dissent from the corporate merger. MCL 450.1762(1)(a). However, a shareholder's remedy for such a corporate action is limited to dissent and an appraisal. A shareholder may not actually challenge the corporate action, unless the action is unlawful or fraudulent with respect to the shareholder or the corporation. MCL 450.1762(3).

Plaintiff did not show that the merger was unlawful or fraudulent with respect to either the corporation or himself. In support of his claim, plaintiff primarily claims that Natural Gas Compression did not mail him a notice of the annual meeting so that he did not attend and did not vote his shares against the merger. However, even if plaintiff had received notice of the meeting and had voted all of his shares, it would have made no difference because 84 percent of the eligible shares voted for the merger and only 71 percent of the eligible votes were needed for the merger to pass.

Plaintiff also maintains that the trial court erred in finding that he did not timely file his claim because the limitation period in MCL 450.1489(1)(f) applies only to claims for damages, it does not apply to claims for equitable relief requested under MCL 450.1489(a)-(e). We disagree.

Under *Estes, supra* at 272, 286, this Court held that the residual catch-all, six year limitation period in MCL 600.5813 applies to claims under MCL 450.1489. However, in 2001 PA 57, the Legislature added MCL 450.1489(1)(f) that provides a three-year limitation period from accrual and a two-year limitation period from discovery for claims requesting damages. But, as plaintiff argues, the amendment did not specifically address the limitation period for claims seeking equitable relief. Accordingly, the residual six-year limitation period in MCL 600.5813 presumably applies to plaintiff's claim insofar as he requests equitable relief instead of damages. But this does not assist plaintiff.

Plaintiff ostensibly requests equitable relief in his complaint, including the unwinding of the merger and the "uncanceling" of his shares. However, plaintiff actually requests damages because he seeks equitable relief only to compel Natural Gas Compression to purchase his shares at "fair value." Thus, the two-year limitation period under the discovery rule applies. As noted above, plaintiff acknowledged that he had a potential cause of action on October 29, 2002, when he informed Natural Gas Compression that he would retain an attorney. However, plaintiff did not file his complaint until two years and ten months later. Therefore, plaintiff's complaint was untimely, even assuming that plaintiff had standing under MCL 450.1489.

Affirmed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra