

STATE OF MICHIGAN
COURT OF APPEALS

TRUSTCORP BANK, OHIO, a/k/a SOCIETY BANK
AND TRUST,

UNPUBLISHED

August 27, 1996

Plaintiff/Counter-Defendant-Appellee,

v

No. 180880

LC No. 88-350257

BERNARD W. CORBY,

Defendant/Counter-Plaintiff-Appellant,

and

CROWN SYSTEMS CORP, formerly known as
GLOBE MFG INC, and PETER L. KAISER

Defendants/Counter-Plaintiffs

Before: Cavanagh, P.J., and Hood and J.J. McDonald,* JJ.

PER CURIAM.

Plaintiff brought this action seeking payment of a loan to Crown Systems Corp (Crown). Defendant Corby (defendant) and co-defendant Kaiser were co-owners of Crown. Defendant filed a counter claim against plaintiff alleging that it engaged in illegal behavior entitling defendant to damages. The trial court granted summary disposition to plaintiff regarding defendant's counter complaint. Defendant now appeals as of right, and we affirm.

I

The trial judge dismissed defendant's counter complaint on the ground that defendant, as an individual, lacked standing to sue plaintiff. On appeal, defendant claims that he suffered an injury which was unique to him, and thus he should have been allowed to sue plaintiff in an individual capacity. We disagree.

* Circuit judge, sitting on the Court of Appeals by assignment.

An action must be brought under the name of the real party in interest. MCR 2.201(B); *Michigan National Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). In general, a suit to enforce the rights of a corporation or to prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not the name of any individual stockholder, officer, or employee. *Id.* Where the alleged injury to the individual is based only on the injury to the corporation, the injury is merely derivative and the individual does not have standing to sue. *Id.* at 679-680.

Because each of the allegations made by defendant in his counter complaint alleged an injury to the corporation and not to defendant as an individual, defendant lacked standing to sue plaintiff. Any damages to defendant were merely derivative of injuries to the corporation, and thus he was obligated to bring suit only in the name of the corporation. See *id.* Thus, the trial court properly granted plaintiff's motion for summary disposition.

II

Defendant next contends that the trial court erred in denying his motion for leave to amend his counter complaint. Leave to amend a complaint should ordinarily be freely given absent undue delay, bad faith, dilatory motive, or futility. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

Defendant filed his proposed second amended counter complaint almost five years after he filed his original counter complaint. Defendant had already amended his counter complaint once and the case had already been mediated. In addition, plaintiff had already deposed defendant, and trial was scheduled to begin less than six weeks later. Defendant did not articulate any justification for the tremendous delay in filing the proposed pleading. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for the reason that the motion was not made in a timely fashion. Cf. *Taylor v Detroit*, 182 Mich App 583, 586; 452 NW2d 826 (1989).

In addition, amendment of defendant's counter complaint was properly denied because such amendment would have been futile. Defendant did not state the basis for his assertion that he had standing to sue, other than to cite *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1; 444 NW2d 779 (1989). *Christner*, however, is inapplicable to the instant case. The plaintiff in *Christner* had an injury which was separate and distinct from the corporation or the other stockholders. *Id.* at 8-9. In this case, defendant's alleged injuries were the same as, and merely derivative of, the injuries to the corporation. Thus, defendant was barred from bringing suit as an individual and was required to bring it in the name of the corporation. See *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 292; 475 NW2d 366 (1991); *Mudgett, supra* at 679. Accordingly, the trial court properly denied defendant's motion for leave to amend his counter complaint.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Harold Hood

/s/ John J. McDonald