IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

JEAN A. ROMNEY, Individually and as a Shareholder of T.R.T. Services, Inc.,	)	**CIVIL NO. 339/98**
Plaintiff,	)	**ACTION FOR EQUITABLE RELIEF AND DAMAGES**
vs.	)	
GARY THOMAS and G&T SERVICES, INC.,	)	
Defendants.	)	**NOT FOR PUBLICATION**

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CABRET, P.J.

MEMORANDUM OPINION

(May 18, 2000)

This matter is before the Court on Defendant, Gary Thomas's Motion to Dismiss. Defendant contends that dismissal is required because Plaintiff, Jean A. Romney's complaint against him asserts a shareholder's derivative action, yet Romney did not comply with the rules for filing such actions. *See* Fed. R. Civ. P. 23.1. For reasons which follow, the motion is denied.

I. FACTS

In his complaint, Romney alleges that since 1991 he has been a shareholder in T.R.T. Services, Inc., (T.R.T.) and that he currently owns between 30% and 45% of the corporation.

Romney also alleges that Thomas has been the majority shareholder and chief operating officer of T.R.T. since creating the corporation and that Thomas is currently the only other shareholder. Romney contends that Thomas has "looted the corporate assets of T.R.T."[1] and/or caused the corporation's assets to be transferred to other entities. Similarly, Romney asserts that Thomas has failed to act in the best interests of the shareholders, failed to account for corporate assets and failed to observe corporate formalities such as providing notice of, and conducting annual meetings. Based on these factual allegations, Romney contends that the defendants are liable for conversion of the corporate assets, that any agreements conveying corporate assets should be rescinded, that Thomas was negligent and has breached his fiduciary obligations to Romney as a shareholder, that Thomas must account for all corporate assets and that a receiver should be appointed to take control of T.R.T.'s property.[2]

II. DISCUSSION

Before addressing Thomas's argument that Romney failed to comply with Rule 23.1, the Court must establish whether Romney's complaint asserts direct or derivative causes of action. Considering the allegations summarized above, it is clear that Romney's claims are derivative of T.R.T. "As a general rule, an action enforces a corporate right 'if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual shareholders.'" Sax v. World Wide Press, Inc., 809 F.2d 610, 613 (9th Cir. 1987) (citations omitted). "Therefore, if the corporate wrong decreases the value of the

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[1] Complaint at Paragraph 13.

[2] In an Order entered April 13, 1999, the Court denied Plaintiff's Motion for Appointment of a Receiver.

corporation's stock, it does not necessarily create a direct cause of action for shareholders." Id. at 614. A direct action can be brought either when there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, or when the shareholder suffers injury separate and distinct from that suffered by other shareholders." Id.

The gravamen of the complaint in the instant case is injury to the corporation. Romney is contending that Thomas's conduct injured T.R.T., and that he, Romney, has thus been harmed as a T.R.T. shareholder. Although Thomas is the only other shareholder, the injuries which Romney claims he suffered are incidental to injuries to T.R.T., and therefore are not injuries to Romney directly. *See* id. Accordingly, the Court concludes that Romney's complaint asserts derivative claims which are governed by Federal Rule of Civil Procedure 23.1. *See* id. at 613.

A plaintiff filing a shareholder derivative action must comply with the pleading requirements established by Rule 23.1. Specifically, the rule requires that

> the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

Fed. R. Civ. P. 23.1. Thomas contends that Romney has not complied with three of these requirements: (1) he did not verify the complaint, (2) he has never been a shareholder of T.R.T. and (3) he did not allege the reasons for failing to obtain the desired action from T.R.T.'s directors or comparable authority. The Court disagrees.

Romney verified the complaint. The purpose of the verification requirement is to "prevent the use of the judicial process for strike suits and collusive actions and to insure that the plaintiffs or their attorneys have investigated the charges and concluded that they possess merit." Thorton v. Evans, 692 F.2d 1064, 1081 (7th Cir. 1982). Courts take a pragmatic approach in assessing compliance with the requirement. *See* Smachlo v. Birkelo, 576 F.Supp. 1439, 1443 (D.Del. 1983).

In this case, the record shows that Romney verified the truth of the complaint in an affidavit attached to his Motion for Appointment of a Receiver. Romney filed the motion contemporaneously with his complaint. Although this affidavit was not specifically designated as a 'verification,' it certainly satisfies the purpose of the verification requirement in Rule 23.1. Accordingly, the Court finds Thomas's objection is without merit.

The Court further finds that Romney has a sufficient interest in T.R.T. to maintain this derivative action. "The rationale behind this standing requirement is quite simply the belief that only a party with an on-going proprietary interest in the corporation will adequately represent the corporation's interests in a derivative action." Schupack v. Covelli, 498 F.Supp. 704, 705 (W.D. Pa. 1980). "It is important to note, however, that one need not have legal title to stock in order to satisfy this standing requirement. Quite the contrary, it is clear that an equitable shareholder possesses a sufficient proprietary interest in the corporation to sue on its behalf." Id.

Furthermore,

> When a plaintiff testifies that he or she is the beneficial owner of certain stock, in order to establish standing to prosecute a derivative suit, the testimony may be rejected as incredible, but that alone is not a sufficient basis for concluding that he

> or she is not a shareholder if there is other evidence supporting the claim of shareholder status.

9A Wm. Meade Fletcher, Fletcher Cyclopedia of Corporations § 4655 at 343 (Perm ed. 2000).

In this case, Romney alleged that is has been a shareholder since 1991. This allegation is supported by Romney's affidavit in which he testified that he has been a shareholder during this time. Romney's affidavit testimony is corroborated by evidence of a letter from Thomas to the Director of the Corporate Division of the Lieutenant Governor's Office in which Thomas acknowledged that Romney invested $12,000 into T.R.T.[3] Considering this evidence, and in light of the fact that Thomas has not pointed to any contrary evidence, the Court finds that there is sufficient proof of shareholder status to confer standing on Romney. *See* Fletcher, *supra.*

Finally, the Court finds that Romney has alleged the reasons for failing to obtain the desired action from T.R.T.'s directors or comparable authority. The Third Circuit has held that demand on the board is not required "where the allegations of the complaint permit the inference by the court that the directors upon whom demand would be made lack the requisite disinterestedness to determine fairly whether the corporate claim should be pursued." Lewis v. Curtis, 671 F.2d 779, 785 (3d Cir. 1982). A court making this determination should focus on "whether a demand on the directors would be likely to prod them to correct a wrong." Id. at 786.

In this case, the Court finds that based on the allegations contained in the complaint, any demand to Thomas for remedial action would have been futile. Romney has alleged that Thomas, as T.R.T.'s chief operation officer, looted the corporation's assets for his personal

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[3] *See* Ltr. from Thomas to Lorna Webster dated May 6, 1995, Plaintiff's Exhibit 3, Hearing on Plaintiff's Motion for Appointment of a Receiver.

benefit. For example, in Paragraph 14 of the complaint, Romney charged that Thomas misappropriated corporate funds, removed corporate assets and cash receipts for his personal use, entertained on the corporate accounts and diverted corporate money for his own use. It is difficult to conceive of more blatant allegations of self-interest. Certainly, Romney could not expect that Thomas would sue himself to remedy these alleged misdeeds. Although Thomas denies these allegations and the ultimate truth will be left to a fact finder, Plaintiff has sufficiently alleged circumstances under which demand would have been futile. *See* id.

III. CONCLUSION

For the reasons stated above, the Court concludes that Thomas's Motion to Dismiss should be denied. Although Thomas correctly characterizes Romney's claims as derivative, Romney has complied with the pleading rules governing shareholder derivative actions. Romney verified the complaint, he has a sufficient equity interest in the corporation and the allegations indicate that demand on Thomas to remedy the situation would have been futile.

MARIA M. CABRET
Territorial Court Judge

A T T E S T:
DENISE D. ABRAMSEN
Clerk of the Court

By: ~~Deputy Clerk~~ 2nd Asst #
Dated: 5/18/00