STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 10, 2013)

RONALD A. KRUPINSKI, Individually and Derivatively on Behalf of SCHARNHORST, INC.	:	
	:	**C.A. No. PB-07-3484**
V.	:	
WILLIAM A. DEYESSO, SCHARNHORST, INC., and RICHARD P. MCCABE	:	

DECISION

SILVERSTEIN, J. Before the Court is Plaintiff Ronald A. Krupinski's (Krupinski) Renewed Motion for Reconsideration of this Court's Orders of February 3, 2012 and April 12, 2012. Krupinski asks the Court to reconsider its rulings that dismiss all but one of his claims against Defendants William A. Deyesso (Deyesso), Richard P. McCabe (McCabe), and Scharnhorst, Inc. (Scharnhorst) (collectively, "Defendants").

I

Facts & Travel

The Court detailed the facts alleged in its written Decision on the Defendants' Motion to Dismiss the Plaintiff's Verified Third Amended Complaint and Jury Demand (the "Complaint"). See Krupinski v. Deyesso, et al., No. PB-07-3484, filed Apr. 12, 2012, Silverstein, J., at 2-6. For context, however, the Court will recount the essential elements of the controversy.

In 1995, Krupinski joined with Defendant Deyesso and non-party Frank Viola to open the Providence Centerfolds, an adult entertainment club. As part of this arrangement, Viola

purchased Scharnhorst,[1] a corporation that owned a liquor license. Krupinski alleges that he was to be a thirty-three percent owner of the club and also work as manager. A permitting issue—apparently the fault of a friend of Krupinski—caused the Providence Centerfolds to close down a day or two after opening, delaying the more permanent establishment of the business by about six months. As a result of this initial snafu, Krupinski agreed to reduce his ownership interest to twenty-five percent. At no time, however, did Krupinski receive a stock certificate, and Scharnhorst's 1996 annual report did not list Krupinski as a director or officer.

In 1997, Viola left the business, conveying his interest to Deyesso, and McCabe became a Scharnhorst shareholder. Seeking to expand the business, Deyesso identified a Worcester, Massachusetts club named "Pudgy's" as a potential new Centerfolds location. "Pudgy's" was ultimately purchased in McCabe's name. Krupinski had acted as the Providence Centerfolds's manager for about a year, but was fired by Deyesso in July 1997. The former owner of "Pudgy's" replaced Krupinski. Deyesso allegedly assured Krupinski that another job in the business would be found for Krupinski, but that promise never came to fruition. Later, however, Krupinski signed a promissory note that contained a provision purporting to take away Krupinski's voting rights in Scharnhorst.[2]

Krupinski did not receive disbursements[3] from Scharnhorst in 1996 or 1997, despite its profitability; however, he received disbursements from 1998 to 2004. Still, Krupinski points to allegedly improper actions taken by Deyesso and McCabe between 1997 and 2005. For

[1] "Scharnhorst" refers to the legal entity, while "Providence Centerfolds" refers to the now-defunct adult entertainment facility.

[2] Deyesso allegedly told Krupinski that the note would vest his interest in Scharnhorst; Krupinski claims that the note was signed under duress.

[3] The Court believes "disbursements" as used in the Complaint means "distributions."

example, Deyesso and McCabe started a company that provided bookkeeping services to Centerfolds in exchange for payments of costs, plus seven percent of the Providence Centerfolds's gross monthly revenues, which Plaintiff contends constituted an alleged breach of the duty of loyalty to Scharnhorst. Additionally, Deyesso and McCabe opened additional clubs in Massachusetts using the name Centerfolds but without providing Krupinski or Scharnhorst with the opportunity to participate. When the Providence Centerfolds location was taken by eminent domain in 2001—and subsequently, Deyesso and McCabe did not timely find a new Providence location—Deyesso and McCabe allegedly used the remaining money in Scharnhorst for themselves. Additionally, they used tangible property left over from the Providence facility—e.g., coolers, chairs, signs—in their new locations.

Scharnhorst's corporate charter was revoked by the Secretary of State on October 7, 2005, for failure to file an annual report. (Pl.'s Renewed Mot. for Reconsideration, Ex. A.) Krupinski filed his original complaint on July 10, 2007. On February 3, 2012, the Court granted without prejudice Defendants' Rule 12(b)(6) Motion to Dismiss all counts of the Second Amended Complaint—except the breach of contract claim brought individually against Deyesso—for its failure to comply with the requirements of Super. R. Civ. P. 23.1. On February 8, 2012, Krupinski filed the Verified Third Amended Complaint, which contained both direct and derivative allegations. On April 12, 2012, the Court granted the Defendants' Motion to Dismiss the Verified Third Amended Complaint. The Court granted the Motion on Counts III, V, VI, VII, and VIII on the basis that the claims were brought beyond the two-year period provided in G.L. 1956 § 7-1.2-1324, and as to Counts II and IV in the Court's discretion, because the Court did not authorize Krupinski to bring new direct claims.

II

Standard of Review

The Rhode Island Superior Court Rules of Civil Procedure, similar to the Federal Rules of Civil Procedure, do not specifically provide for motions to reconsider. School Comm. of City of Cranston v. Bergin-Andrews, 984 A.2d 629, 649 (R.I. 2009). However, our Supreme Court applies a liberal interpretation of the rules, and "look[s] to substance, not labels." Sarni v. Melocarro, 113 R.I. 630, 636, 324 A.2d 648, 651 (1974). Accordingly, courts should treat a motion to reconsider as a motion to vacate under Super. R. Civ. P. 60(b). Bergin-Andrews, 984 A.2d at 649 (citing Keystone Elevator Co. v. Johnson & Wales Univ., 850 A.2d 912, 916 (R.I. 2004)).

Rule 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from final judgment, order, or proceeding . . . ." Super. R. Civ. P. 60(b). It is well settled that a Rule 60(b) motion to vacate "is addressed to the trial justice's sound judicial discretion and 'will not be disturbed on appeal, absent a showing of abuse of discretion.'" Keystone Elevator Co., 850 A.2d at 916 (quoting Crystal Rest. Mgmt. Corp. v. Calcagni, 732 A.2d 706, 710 (R.I. 1999)). However, our Supreme Court has cautioned that Rule 60(b) is not "a vehicle for the motion judge to reconsider the previous judgments in light of later-discovered legal authority that could have and should have been presented to the court before the original judgment entered." Jackson v. Medical Coaches, 734 A.2d 502, 505 (R.I. 1999) (citations omitted). Similarly, a party should not use Rule 60(b) merely to seek reconsideration of a legal issue or as a request that the trial court change its mind. See id., 734 A.2d at 508 n.8 (citing United States v. Williams, 674 F.2d 310, 312-13 (4th Cir. 1982)); see also Cashner v. Freedom Stores, Inc., 98 F.3d 572, 577 (10th Cir. 1996) (noting that Rule 60(b) is not

intended "to allow a party merely to reargue an issue previously addressed by the court when the re-argument merely advances new arguments or supporting facts which were available for presentation at the time of the original argument").

III

Discussion

The Plaintiff's Renewed Motion for Reconsideration attacks two Orders of this Court. First, it attacks the "April 12, 2012 Order," which dismissed Counts II-VIII of the Verified Third Amended Complaint and Jury Demand.[4] Second, it attacks the "February 3, 2012 Order," which dismissed without prejudice Counts II-VI of the Plaintiff's Second Amended Complaint, but permitted twenty days leave to file an Amended Complaint.[5]

A

Dismissal of Counts II-VIII of the Verified Third Amended Complaint and Jury Demand

The Court's April 12, 2012 Decision on the Motion to Dismiss the Verified Third Amended Complaint (the "Decision") was based on an interpretation and application of § 7-1.2-1324. Section 7-1.2-1324 provides:

> Survival of remedy after dissolution. – The dissolution of a corporation either:
>
> (a) By the issuance of a certificate of dissolution by the secretary of state; or

[4] The related Decision is dated April 12, 2012, but the Order was actually entered on April 17, 2012.

[5] The motion was heard and granted from the bench on February 3, 2012, but the Order was actually entered on February 10, 2012. The Order does not specify to which version of the Complaint it applies. While the Plaintiff refers to it as the "First Amended Complaint" in this Motion, the memoranda in the file prior to February 3, 2012, and this Court's April 12, 2012 Decision, refer to the "Second Amended Complaint."

> (b) By a decree of court when the court has not liquidated the assets and business of the corporation as provided in this chapter; or
>
> (c) By expiration of its period of duration; does not take away or impair any remedy available to or against the corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to the dissolution if action or other proceeding on the right, claim, or liability is commenced within two (2) years after the date of the dissolution. Any action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors, and officers have power to take any corporate or other action that is appropriate to protect the remedy, right, or claim. If the corporation was dissolved by the expiration of its period of duration, the corporation may amend its articles of incorporation at any time during the period of two (2) years so as to extend its period of duration.

The Court held that § 7-1.2-1324 is a statute of repose; thus, the two-year bar was absolute. See Krupinski, No. PB-07-3484, at 9-11. Additionally, the Court held that the derivative claims in the Verified Third Amended Complaint do not relate back to the original complaint. Id. at 11-13. The Court's Decision was based on the representation that Scharnhorst was "dissolved." Now, however, the Plaintiff alleges that the "loose" use of the word "dissolution" has caused legal error. Scharnhorst was not, in fact, "dissolved," but rather, the Secretary of State merely issued a "Certificate of Revocation of Certificate of Incorporation/Authority"; "revocation" is a term not employed in § 7-1.2-1324.

1

Reinstatement

As a preliminary matter, the issue of Scharnhorst's purported reinstatement has been raised in regard to this Motion. Although not argued head-on in the initial Motion papers, it came up at oral argument and was discussed in each party's most recent filing: the Plaintiff's reply dated March 22, 2013, and the Defendants' sur-reply dated April 4, 2013. See Defs.'

Mem. in Resp. to Pl.'s Reply; Pl.'s Reply Supp. Mot. for Reconsideration; Reconsideration Hr'g Tr. 18-22, May 18, 2012. Regardless of any representation about Scharnhorst's current corporate status, the Verified Third Amended Complaint merely states that Krupinski has sought to reinstate Scharnhorst. (Compl. ¶ 96.) Thus, an actual reinstatement is not before the Court because the Court is "confined to the four corners of the complaint" on a motion to dismiss. Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 278 (R.I. 2011).

Nevertheless, the record in this case—although not appended to this Motion or the Complaint—includes an Affidavit of Ronald Krupinski stating that Scharnhorst was reinstated on May 2, 2012. (Krupinski Aff. ¶ 4, May 2, 2012.) Notably, it took four attempts for Krupinski and his attorney to accomplish this reinstatement: three clerks in the Office of the Secretary of State opined that a shareholder could not reinstate a company, but a fourth capitulated, "I can't see why not." Id. ¶ 2-3. Krupinski also attached to his affidavit a Certificate of Good Standing for Scharnhorst from the Secretary of State. See id. ¶ 4. Even if such a reinstatement was made part of the Verified Third Amended Complaint, Scharnhorst was not properly reinstated. The Secretary of State revoked Scharnhorst's charter for failure to file an annual report. (Reconsideration Hr'g Tr. 10-11, May 18, 2012.) While the revocation may be withdrawn if the corporation remedies this omission, an annual report "must be executed on behalf of the corporation by its authorized representative." Section 7-1.2-1501; see also § 7-1.2-1312 (describing procedure for withdrawal of certificate of revocation). Krupinski has alleged that he is merely a shareholder, thus he is not qualified to seek reinstatement because he is not an

authorized representative of Scharnhorst. Therefore, for purposes of this Motion to Dismiss, Scharnhorst remains an inactive corporation.[6]

2

Rule 60(b) and the Verified Third Amended Complaint

The Court first points out that the most recent Complaint still alleges that Scharnhorst was dissolved and not revoked: "Scharnhorst, Inc. was dissolved without notice to Krupinski. Scharnhorst, Inc. was dissolved on October 7, 2005, finally effective October 7, 2007." Compl. ¶ 80. Thus, Krupinski is advancing a new legal theory on the same Complaint, even though the language in the Complaint belies the legal theory he advances in his papers.[7]

Superior Court Rule of Civil Procedure 60(b) permits a trial justice to vacate a judgment when appropriate to accomplish justice, but it is not intended to be a catch-all. Brown v. Amaral, 560 A.2d 7, 11 (1983). In Bendix Corp. v. Norberg, "either through his own or counsel's inadvertence, [the Defendant tax administrator] neither considered the applicability of [a relevant statute] when the case was originally heard before him nor brought it to the attention of the trial justice when the case was being reviewed in the Superior Court." 122 R.I. 155, 158, 404 A.2d 505, 506 (1979). The Court noted that other "courts have refused to grant relief under Rule 60(b) when a party or his counsel, after trial, discovers applicable law that he did not perceive or raise at trial." Id. at 158-59, 507 (noting cases under analogous federal rule). The Supreme

[6] Krupinski argues that the reinstatement issue "is not material to this motion as the Statute of Repose would only apply if Scharnhorst, Inc. were dissolved in accordance with Sections 7.1.2-1301-1303 [sic]." While it is true that reinstatement is not an issue because reinstatement is not contained in the Complaint as discussed above, it is material in the sense that if Scharnhorst was properly reinstated, no part of § 7-1.2-1301 et seq. would apply. See § 7-1.2-1312 (providing for reinstatement "as if its articles of incorporation had not been revoked").

[7] This Decision should not be read to suggest that the Court is inviting yet another amended complaint.

Court upheld the District Court's ruling that "Fed. R. Civ. P. 60(b) does not provide an avenue for relief from judgment where the only justification for that relief is the litigant's failure to argue a legal theory or to interpose an arguably applicable defense." Id. at 159, 507.

The circumstances here are remarkably similar. It was not until over four years after the original complaint was filed, over two months after the most recent Complaint was filed, and fifteen days after the Court issued its Decision, that Krupinski noticed that different statutory sections may apply and brought it to the Court's attention. The only difference today from the Court's Decision nearly one year ago is the additional legal theory advanced by Krupinski. Although this judgment results from a Decision on a Motion to Dismiss rather than a trial as in Bendix, Rule 60(b)'s single standard applies to all judgments in the same manner. See Super. R. Civ. P. 60(b). Because this theory was available at the time of the Court's Decision, the Court denies Krupinski's Motion to Reconsider. See id.; see also Jackson, 734 A.2d at 505 ("Rule 60(b) does not constitute a vehicle for the motion justice to reconsider the previous judgments in light of later-discovered legal authority that could have and should have been presented to the court before the original judgments entered.").

3

The Applicability of § 7-1.2-1324 to Revocation

Even looking at the merits of Krupinski's new-found legal argument does not provide the extraordinary circumstances necessary to justify relief. See Bendix, 122 R.I. at 158, 404 A.2d at 506 (quoting 1 Kent, R.I. Civ. Prac. § 60.08 (1969)) ("Professor Kent suggests that the 'circumstances must be extraordinary to justify relief.'") Krupinski argues that § 7-1.2-1324 is "entirely inapplicable to the case at hand and has no legal relevance with respect to the derivative claims." (Pl.'s Mot. for Reconsideration 3.) Thus, the ten-year general statute of limitations

should apply to the breach of fiduciary duty claims in this case. The Defendants argue that § 7-1.2-1324 still does bar Krupinski's claims because Rhode Island law treats revocation and dissolution similarly.

"In construing the provisions of statutes that relate to the same or to similar subject matter, the court should attempt to harmonize each statute with the other so as to be consistent with their general objective scope." Kaya v. Partington, 681 A.2d 256, 261 (R.I. 1996). The Rhode Island Business Corporation Act addresses "Dissolution and Revocation" at § 7-1.2-1301 et seq. Some sections within this topic only refer to dissolution, some only refer to revocation, and some refer to both actions. See § 7-1.2-1301 et seq. Individual sections use slightly different wording regarding the issuance of certificates of either dissolution or revocation. See id. § 1301(b) ("Upon the issuance of the certificate of dissolution by the secretary of state, the existence of the corporation ceases."); id. § 1311(b) ("Upon the issuance of the certificate of revocation, the authority of the corporation to transact business in this state ceases."). The most significant difference between the two is that dissolution seems to be more permanent. When a corporation voluntarily dissolves, it may only withdraw such dissolution within 120 days of the effective date of the articles of dissolution. Id. §§ 1304-05. This is contrasted by revocation, where the secretary of state may withdraw the revocation for up to ten years after the issuance of the certificate, provided that the corporation meets certain requirements. Id. § 1312.

While dissolution and revocation do diverge on these points, when read together, the relevant acts regarding corporate litigation are similar. First, no section in § 7-1.2-1301 et seq. addresses the survival of a remedy after revocation. Elsewhere in § 7-1.2-1301 et seq., the statutes typically define the differences when they exist. For example, three different procedures may apply depending on whom is seeking voluntary dissolution. See id. §§ 1301-03. These

procedures are different than the procedures required for revocation and involuntary dissolution. Compare id. with id. §§ 1311, 1320. But, § 7-1.2-1324 is silent. It only nominally mentions "dissolution" (without discriminating between the voluntary or involuntary type) and no coordinate provision applies to revocation.

This Court believes that § 7-1.2-1324 also applies to certificates of revocation based on the continuation of corporate powers provision and related case law. Section 7-1.2-1325 provides for the continuation of certain corporate powers for five years, regardless of the form or reason for the corporation's lack of authority:

> Any corporation dissolved in any manner under this chapter or any corporation whose existence is terminated under § 44-12-8 or any corporation whose articles of incorporation are revoked by the secretary of state under § 7-1.2-1310 nevertheless continues for five (5) years after the date of the dissolution, termination, or revocation for the purpose of enabling it to settle and close its affairs, to dispose of and convey its property, to discharge its liabilities, and to distribute its assets, but not for the purpose of continuing the business for which it was organized. The shareholders, directors, and officers have power to take any corporate or other action that is appropriate to carry out the purposes of this section. Id. § 1325.

Section 1325 delineates the extent of corporate powers after both dissolution and revocation, and the powers are limited to winding-up purposes and a duration of five years. See id. The corporation clearly does not have the power to sue beyond that five-year point; thus, it also does not have the power to be sued. Cf. Theta Properties v. Ronci Realty Co., Inc., 814 A.2d 907, 912 (R.I. 2003) ("[I]t would be anomalous for the General Assembly to allow a dissolved corporation to be sued indefinitely, while prohibiting it from asserting its rights against others."). It would also be anomalous to allow a corporation to sue or be sued up until the last day of the five-year period. The purpose of § 7-1.2-1325 is to allow an orderly and complete wind-up to occur within the five-year period that the corporation has its limited continuing powers. Allowing a

suit right up until the last day would forestall that orderly process and likely prevent the full settlement of its affairs within the five-year period. The imposition of § 7-1.2-1324's two-year requirement for suits on revoked charters facilitates § 7-1.2-1325's purpose of permitting a limited five-year wind-up period. See Kaya v. Partington, 681 A.2d at 261 (court should attempt to harmonize related statutes).

Rhode Island cases also support this proposition. In Theta, the Court stated broadly that "the shareholders of a dissolved corporation may not bring a claim in the name of the corporation unless they assert it before the expiration of the statutory wind-up period." 814 A.2d at 912 (discussing statute with equal wind-up period and survival of claims period). While directly addressing dissolution, this case shows that the reasoning applied above is correct: the concern about remaining claims relates to the length of the wind-up period, which applies to both dissolution and revocation. "[A]n action [that] seeks to redress a wrong done to the corporation, or if the claim arises solely as a consequence of a corporate wrong, the claim is derivational in nature and will not survive past the windup period." Halliwell Associates, Inc. v. C.E. Maguire Services, Inc., 586 A.2d 530, 533 (R.I. 1991) (stated in context of a Massachusetts corporation and Massachusetts statute); see Theta, 814 A.2d at 912 (noting applicability of Halliwell to Rhode Island statute). When addressing a Massachusetts statute where the same time period applied to the wind-up and the survival of legal claims, the Rhode Island Supreme Court concluded that "allowing such suits to proceed after the expiration of the windup period would render the limitation contained in the Massachusetts survival statute a nullity, barring nothing." Halliwell, 586 A.2d at 535.

Because (1) no statute directly addresses the survival of remedies after revocation; (2) § 7-1.2-1324 applies to all types of dissolution; (3) the allowance of claims to be brought by or

against the corporation up until the end of the wind-up period would frustrate the purpose of the five-year wind-up period; and (4) the Supreme Court's concern about the interplay of § 7-1.2-1324 and the wind-up period, this Court concludes that § 7-1.2-1324 also applies to revoked corporate charters. As stated in the Court's previous Decision, § 7-1.2-1324 is a statute of repose and therefore, does not relate back to the original Complaint. Accordingly, the Motion for Reconsideration is denied because the derivative suit was brought after the expiration of the two-year period in § 7-1.2-1324.

B

Dismissal of Counts II-VI of the Second Amended Complaint

Krupinski argues that the Court's Decision to dismiss Counts II-VI of the Second Amended Complaint should be reconsidered and reversed. (Pl.'s Mot. for Reconsideration 8.) However, the limited argument presented merely reargues the argument made in the first instance. See id. at 7-8. Thus, reconsideration is not appropriate. See Williams, 674 F.2d at 313 ("Where the motion is nothing more than a request that the district court change its mind . . . it is not authorized by Rule 60(b)."). Even if the arguments were newly developed, these arguments could have been presented in the first instance. Thus, reconsideration is also not appropriate for that reason. See Jackson, 734 A.2d at 505.

IV

Conclusion

After due consideration, the Court denies the Plaintiff's request that the Decision be reconsidered and reversed. Krupinski's Motion to Reconsider is inappropriate because the newly advanced legal theory was available at the time of the original Motion to Dismiss Decision, and the derivative claims in the Verified Third Amended Complaint remain barred by § 7-1.2-1324.

Additionally, Krupinski merely reargues his previous argument relating to the Second Amended Complaint. Prevailing counsel shall present an order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Ronald A. Krupinski v. William A. Deyesso, et al.
CASE NO:	PB-07-3484
COURT:	Providence County Superior Court
DATE DECISION FILED:	April 10, 2013
JUSTICE/MAGISTRATE:	Silverstein, J.
ATTORNEYS:	
For Plaintiff:	Andrew J. Tine, Esq.
For Defendant:	Carl S. Levin, Esq. Christopher A. Murphy, Esq.