

ORIGINAL

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT, P. O. BOX 3315
WEST PALM BEACH, FL 33402

4TH DCA CASE NO. 4D08-4057

L.T. Case No : 502006CA005626XXXXMB

ALAN I. KARTEN TRUSTEE,

Appellant,

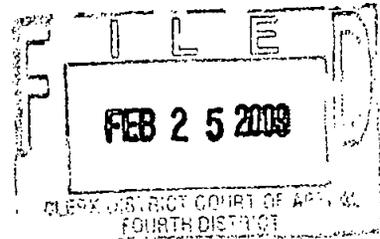
vs.

ROBERT I WOLTIN and CARL KARMIN,

Appellees.

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FOURTH DISTRICT

APPELLEES' ANSWER BRIEF



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INTRODUCTION

The action below was brought by the plaintiff, Alan I. Karten, Trustee of the Alan I. Karten Trust UA D/T/D 1/5/85. Alan Karten Trustee was the plaintiff in the court below and is the appellant herein and will be referred to as "Karten". The defendants in the court below were Robert I. Woltin and Carl Karmin. Robert Woltin and Carl Karmin are the appellees herein and will be referred to as "Woltin" and "Karmin" respectively.

References to the record (docket) furnished to this court by the clerk will be by the designation, "R_".

ISSUES

I. Whether the issues raised in the second amended complaint had previously been reduced to final judgment in a previous lawsuit which judgment was affirmed on appeal precluding relief herein.

II. Whether the trial court correctly ruled in ordering that the plaintiff's complaint failed to state a cause of action and could only properly proceed as a shareholder derivative action.

STATEMENT OF THE CASE

Karten filed a complaint in the Circuit Court of Palm Beach County and was seeking relief from Woltin and Karmin. Karten, Woltin, and Karmin were the shareholders in 201 East Atlantic Investments, Inc., a Florida corporation.

Karten filed a second amended complaint that consisted of a single cause of action for breach of fiduciary duty against Woltin and Karmin. (R 41-46). Woltin and Karmin answered the second amended complaint (R 91-93) denying the allegations of the second amended complaint and raising affirmative defenses. The following affirmative defenses were raised:

- "1. Failure to state a cause of action upon which relief can be granted;
2. Statute of limitations;
3. Res judicata, judicial estoppel and/or doctrine of issue preclusion, collateral estoppel and/or prohibition against splitting causes of action by virtue of the actions raised which could have been raised in Palm Beach Case No. 502002-CA007004XXOCAF and/or the final judgment entered by the court in that action;
4. That the plaintiff was not entitled to a direct action against the defendants and had to bring the action as a shareholder derivative suit pursuant to Florida Statute 607.07401;
5. The plaintiff was no longer a shareholder in the subject corporation;
6. A purchase and sale of the stock interest of Karten and Karmin by Woltin pursuant to a written agreement was a novation to any and all prior agreements or arrangements between the parties precluding recovery by Karten;
7. 201 East Atlantic Investments, Inc was an indispensable party to the action;
8. Karmin is not a proper party to the action because he sold his interest in the corporation to Woltin;
9. That Woltin and Karmin on behalf of the corporation advanced funds to the corporation to pay expenses and bills of the corporation which numbers should be a set-off from any amounts claimed.

The issue then proceeded to hearing on a motion for summary judgment. The motion for summary judgment was filed by Woltin and Karmin. (R 274-277). The court granted the defendants' summary judgment motion on June 18, 2008 (R 356-358), ordering that Karten could not bring the breach of fiduciary duty claim as an individual claim against Woltin and Karmin, but could only bring this action as a shareholder's derivative action, in that the harm suffered was by the corporation and not the individual shareholder, as Karten alleged.

The trial court in the summary final judgment also ruled that the issues raised by the plaintiff were previously litigated in a prior lawsuit between the parties hereto that was reduced to a final judgment, which was appealed and affirmed by the Fourth District Court of Appeal.

The order granting the summary judgment was reduced to a final judgment on September 25, 2008 (R 397-400) and this appeal was filed.

STANDARD OF REVIEW

This appeal concerns the question of whether the trial judge made errors of law. The general standard of review governing a trial court's ruling on a motion for summary judgment posing pure questions of law is "de novo." Major League Baseball vs. Morsani, 790 So.2d 1071, 1074 (Fla. 2001).

SUMMARY OF ARGUMENT

Karten in a separate and previously filed lawsuit against Woltin and Karmin, raised the same factual and legal issues. That case was styled, Alan I. Karten, Trustee of the Alan I. Karten Trust UA D/T/D 1/5/85, Plaintiff vs. 201 East Atlantic Investments, Inc, Robert I Woltin and Carl Karmin which was filed in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida in case no. 502002CA007004XX0CAF. (R 274-277). In that litigation, Karten filed an amended complaint and alleged in Count II for dissolution of 201 East Atlantic Investments, Inc, and damages against Karmin and Woltin for the same factual and legal allegations that were made in the action currently pending before this court that were presented in the trial court below. Karten in the prior action was seeking dissolution of the corporation pursuant to Florida Statute 607.1430-1433 and for damages against Woltin and Karmin for their alleged breach of fiduciary duty. The trial court in the previous action ruled in the amended final judgment signed on October 11, 2006 that any action seeking compensation for the issues involved in this lawsuit should have been brought as a derivative action pursuant to Florida Statute 607.07401. That final judgment was appealed by Karten and the Fourth District Court of Appeal affirmed the trial court final judgment on February 27, 2008. (See exhibits to the summary judgment motion filed by Woltin and Karmin in this cause) (R 274-

277 exhibits). The trial court below in its final judgment in paragraph 8 and 9 ordered as follows:

"8. The second amended complaint filed in this cause by Alan I Karten, Trustee for breach of fiduciary against Robert I. Woltin and Carl Karmin alleged the same underlying behavior and facts of excessive compensation, Mismanagement, and self dealings as the amended complaint brought before this court for accounting and for dissolution of the corporation, 201 East Atlantic Investments, Inc., in the case styled, Alan I. Karten Trustee U/A D/T/D 1/5/85 vs 201 East Atlantic Investments, Inc., Robert I. Woltin and Carl Karmin, Case no. CA02-007004AF. This court has already ruled that these allegations must be brought as a derivative claim under Florida Statute 607.

9. The allegations set forth in the second amended complaint in this action dated June 27, 2007 do not set forth any unique facts of a direct loss to Alan I. Karten, Trustee. All of the allegations of the second amended complaint are directed to alleged damages which would have been incurred by 201 East Atlantic Investments Inc., and were not direct losses suffered by Alan I. Karten Trustee."

The order granting summary judgment was reduced to final judgment on September 25, 2008. (R 397-400)

Karten did not allege injury separate and distinct from those sustained by any of the other shareholders of the corporation as required by Florida Statute 607.07401 and as a result, the plaintiff wrongfully attempted to bring a cause of action in his own individual capacity as opposed to complying with the derivative action statute. Chemplex Florida vs. Norelli, 790 So.2d 547 (4th DCA 2001); Camper Corral, Inc. vs. Perantoni, 801 So.2d 990 (2nd DCA 2001).

There was no unique relationship or set of facts that were

alleged by Karten in the second amended complaint that entitled Karten to individual damages. All allegations were causes of action held by the corporation and required the claim to be filed as a derivative claim pursuant to Florida Statute 607.07401.

ARGUMENT

I. The issues raised in the second amended complaint had previously been reduced to final judgment in a previous lawsuit which judgment was affirmed on appeal precluding relief herein.

The trial court properly granted the summary final judgment for Woltin and Karmin (R. 397-400). The court set forth its reasoning in the summary final judgment. The Honorable Judge Diana Lewis was the trial judge in a fully contested trial in the previously filed action of Alan I. Karten, Trustee U/A D/T/D 1/5/85 vs. 201 East Atlantic Investments, Inc., Robert Woltin and Carl Karmin, trial case no. CA02-007004AF. In the previously filed litigation, the same factual and legal allegations were brought by Karten in a dissolution action to dissolve 201 East Atlantic Investments, Inc., and against Woltin and Karmin for money damages for breach of fiduciary duty. Karten in that action made Woltin and Karmin defendants and alleged the same factual and legal allegations as in the second amended complaint filed in the trial court below now pending before this court on appeal. The court in the previous action ruled that no damages would be awarded against Woltin and Karmin because those issues

must be brought as a derivative claim under Florida Statute 607 (R 274-277).

The trial court after hearing the argument on the motion for summary judgment ruled that these matters were already ruled upon in the prior action which was affirmed by the Fourth District Court of Appeal. The trial court for a second time ruled that the claim set forth in the second amended complaint are derivative claims and that Karten failed to comply with Florida Statute 607.07401. The issues attempted to be raised by Karten in this action are precluded by res judicata, Florida Farm Bureau Mutual Insurance Company vs. Florida Fruit and Vegetable Association, 436 So.2d 1052 (4th DCA 1983); Department of Legal Affairs vs. Fifth District Court of Appeal, 434 So.2d 310 (Fla. 1983); McDaniel vs. Musgrove, 427 So.2d 1091 (1st DCA 1983). The trial court below in its final judgment in paragraph 8 and 9 ordered as follows:

"8. The second amended complaint filed in this cause by Alan I Karten, Trustee for breach of fiduciary against Robert I. Woltin and Carl Karmin alleged the same underlying behavior and facts of excessive compensation, Mismanagement, and self dealings as the amended complaint brought before this court for accounting and for dissolution of the corporation, 201 East Atlantic Investments, Inc., in the case styled, Alan I. Karten Trustee U/A D/T/D 1/5/85 vs 201 East Atlantic Investments, Inc., Robert I. Woltin and Carl Karmin, Case no. CA02-007004AF. This court has already ruled that these allegations must be brought as a derivative claim under Florida Statute 607.

9. The allegations set forth in the second amended complaint in this action dated June 27, 2007 do not set forth any unique facts of a direct loss to Alan I. Karten, Trustee. All of the allegations of the second amended complaint are directed to alleged damages which would have been incurred by 201 East Atlantic Investments Inc., and were not direct losses suffered by Alan I. Karten Trustee."

The appellant before this court does not address in its brief the issue that the Fourth District Court of Appeal has previously affirmed the amended final judgment determining that the claims brought in this action were derivative claims that had to comply with Florida Statute 607.07401.

In the motion for summary judgment filed by the Woltin and Karmin and argued in the court below (R 274-277) attached as Exhibit F is Karten's initial brief, in case no. 4D06-4334 in the case styled, Alan I. Karten Trustee of the Alan I. Karten Trust U/A D/T/D 1/5/85, Appellant vs. 201 East Atlantic Investments, Inc, Robert I. Woltin and Carl Karmin, Appellees, which was the appeal of the amended final judgment in case no. 502002CA007004XXOCAF. This issue was fully litigated before the Honorable Judge Lewis in the prior action and the court ruled in the final judgment in the trial below that the claim factually alleged by Karten was identical to the allegations of fact and law as alleged in the prior case and that Karten was not entitled to damages against Karten and Woltin. In the brief filed by Karten, in the prior case before the Fourth District Court of

Appeal and written by Norman Malinski point three of the brief was titled as follows:

" Whether the trial court erred in determining that Damages could not be awarded since this action could only properly proceed as a shareholder's derivative action."

The same argument was presented in the prior appellate brief and argument before this court by Karten. In the appellees answer brief filed in the prior case, which was also attached as an exhibit to the motion for summary judgment, issue four reads as follows:

" The trial court properly ruled that the damages could not as a matter of law be awarded in this action to the appellant because the appellant did not bring the action as a shareholder derivative action."

The Fourth District Court District Court of Appeal in Case no. 4D06-4334 per curiam affirmed the lower court final judgment.

The same allegations were refiled by Karten in the second amended complaint before this court which was dismissed by summary final judgment by the trial court which is now on appeal before this court once again.

II. The trial court correctly ruled in ordering that the plaintiff's complaint failed to state a cause of action and could only properly proceed as a shareholder derivative action.

The trial court correctly ruled in ordering that the plaintiff's complaint failed to state a cause of action and could

only properly proceed as a shareholder derivative action.

The appellant attempts to draw a distinction that a breach of fiduciary duty is a tort and that it is therefore removed from the requirements of Florida Statute 607.07401. Florida Law has been consistent and clear that a shareholder cannot sue in the shareholder's name for an injury to a corporation unless there is a special duty between the wrongdoer and shareholder, and the shareholder has suffered an injury separate and distinct from that suffered by other shareholders. Braun vs. Buyers Choice Mortgage Corp., Ex Rel. McAloon, 851 So.2d 199 (4th DCA 2003).

Karten has not alleged any injuries that are separate and distinct from those sustained by any of the other shareholders of the corporation. Karten for a second time wrongfully attempted to bring a cause of action in his own individual capacity as opposed to complying with the derivative action statute, Florida Statute 607.07401. Florida vs. Norelli, 790 So.2d 547 (4th DCA 2001). In the case of Camper Corral, Inc. vs. Perantoni, 801 So.2d 990 (2nd DCA 2001), the members of a recreation and property owners' association for a recreational vehicle resort community brought an action against the association's vice president, secretary, and others seeking injunctive relief and damages for breach of fiduciary duty relating to the operation of the resort. In that action, it was held that the plaintiff in the trial court below did not bring the action in a derivative

capacity, but an individual capacity. The plaintiff in that action did not allege nor prove that they suffered any individual losses as a result and breaches by the officers and directors for breach of fiduciary duty. Rather, all of the allegations against the two individuals were for harm suffered by the association itself. It was held that the plaintiff below who obtained a verdict was not entitled to damages, that the association suffered as a result of the breaches by the officers and directors and the final judgment was reversed. Camper Corral, Inc. vs. Perantoni, 801 So.2d 990 (2nd DCA 2001).

The appellant Karten seeks to draw the distinction before this court that breach of fiduciary duty is a tort and therefore somehow that makes the cause of action personal in nature and therefore not governed by Florida Statute 607.07401. The appellant cites, Gracey vs. Eaker, 837 So.2d 348 (Fla. 2002). That case is completely inapplicable to any of the issues before this court and is misleading. In that action before the Supreme court of Florida, Patients brought a negligence action against a psychotherapist alleging breach of confidentiality. The Supreme Court held that the psychotherapist who has created a fiduciary relationship with his or her client owes that client a duty of confidentiality, and a breach of such a duty is actionable in tort. The court further ruled on issues involving the impact rule. That case has nothing to with the action before this

court. That case did not involve actions of officers and directors with regard to their duties and allegations of breach of fiduciary duty in the context of Florida corporations and compliance with Florida Statute 607.07401.

In Mortellite vs. American Tower, LP, 819 So.2d 928 (2nd DCA 2002) cited by the appellant is not applicable to the issues before this court. A majority shareholder in a corporation concealed information from the minority shareholder concerning a contract of sale to purchase the entire company. The fraud on the part of the majority shareholder defrauded the minority shareholder out of the specific stock that he owned in the corporation. The fraudfeaser had a contract in his back pocket for a significant sum of money and did not disclose that information to the minority shareholder at the time when the majority shareholder bought the minority shareholder's stock for a fixed smaller sum. The fraudfeaser majority stock holder after purchasing the minority owner's stock then sold all of the stock to a third party receiving a huge profit. The case was not brought as a derivative claim under Florida Statute 607.07401 and that statute was not mentioned nor analyzed in the opinion. It is clear that the damage suffered by the minority stockholder was direct and unique specifically involving his specific shares being purchased. The Mortellite vs. American Tower, LP, 819 So.2d 928 (2nd DCA 2002) cited by the appellant in his brief is

inapplicable to the facts before this court. Karten did not allege in his second amended complaint any damage that was unique to him as a result of the alleged breach of fiduciary duty. Any damage of alleged self dealing or alleged excessive compensation would have been causes of action directed to the corporation, 201 East Atlantic Investments, Inc and would have been reflected in the stock values of the respective shareholders. There was no unique standing of Karten to any damages because of a unique direct claim which he possessed.

A stockholder may only bring a suit in their own right to redress injuries sustained directly by them individually which are separate and distinct from that sustained by other stockholders. If however, the injury is primarily against the corporation or stockholders generally, then the cause of action is in the corporation and the stockholder's right to bring the action is derived from the corporation pursuant to Florida Statute 607.07401 and must be brought as a derivative claim. Fort Pierce Corporation vs. C.L. Ivey, 671 So.2d 206 (4th DCA 1996).

The argument put forth by the appellant seeks to change the law in the State of Florida. Karten argued that because 201 East Atlantic Investments, Inc., is a closely held corporation it is somehow a distinction with a difference and that he should be able to bring any cause of action for breach of fiduciary duty in his own name.

CONCLUSION

Based on the foregoing, Woltin and Karmin respectfully request this court to affirm the lower court's summary final judgment directed to the second amended complaint for breach of fiduciary duty, and to deny the appellant's request for oral argument in this cause. The issues raised by the appellant were already ruled upon in a prior lawsuit, reduced to a final judgment, and affirmed by the Fourth District Court of Appeal. Oral argument is not warranted in this matter.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Answer Brief of the Appellees has been provided by the U.S. mail to all parties noted on the attached Service List, this 17 day of February, 2009.


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CERTIFICATE OF COMPLIANCE

I hereby certify that the computer generated Brief for the Appellees, Robert I. Woltin, and Carl Karmin, was prepared using Courier New 12-point in accordance with the Florida Rules of Appellate Procedure, Rule 9.210, Briefs. Therefore, the Brief of the Appellees complies with the font requirements of the rule.


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