

STATE OF MICHIGAN
COURT OF APPEALS

ANTONIO VACCA and ANTONIETTA
PALADINO,

UNPUBLISHED
September 11, 2012

Plaintiffs-Appellants,

v

No. 304360
Wayne Circuit Court
LC No. 10-013914-CB

UNITED AMERICAN HEALTHCARE
CORPORATION, JOHN FIFE, WILLIAM
BROOKS and THOMAS GOSS,

Defendants-Appellees.

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs own shares of stock in defendant United American Healthcare Corporation (UAHC). They claim that certain UAHC directors – John Fife, William Brooks, and Thomas Goss – breached their fiduciary duties and engaged in wrongful acts that reduced the UAHC stock value. Despite that UAHC stock has been publicly traded at all relevant times, plaintiffs filed a shareholder action under MCL 450.1489, which applies only to closely held corporations. Because plaintiffs pursued their action under an inapplicable statute and amendment of their complaint would be futile, we affirm the circuit court’s summary dismissal judgment.¹

We review a circuit court’s grant of summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Defendants sought dismissal under MCR 2.116(C)(8), “fail[ure] to state a claim on which relief can be granted,” but relied on documentary evidence beyond the pleadings. As the court considered that evidence in granting the motion, our review must be based on MCR 2.116(C)(10). *Krass v Joliet, Inc*, 233 Mich App 661, 665; 593 NW2d 578 (1999).

¹ The circuit court actually dismissed plaintiffs’ claims because they lacked standing as individuals to bring what are essentially derivative claims. We affirm the circuit court on our alternative stated ground without reaching the merits of the standing issue.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (quotation marks and citations omitted).]

Even read in the most liberal manner, plaintiffs' complaint only raised claims under MCL 450.1489. MCL 450.1489(1) permits a corporate shareholder to bring a direct action against corporate directors alleging that their acts "are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." The statute precludes actions "by a shareholder whose shares are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association." MCL 450.1489(2).

Plaintiffs admitted in their complaint that "UAHC traded on the NASDAQ, a 'national or affiliated securities association'" until it "was delisted" on June 29, 2010. In their responsive motion for summary disposition, defendants asserted that UAHC continues to be "a publicly traded company, whose shares are listed on and trade in the over the counter market, OCTGB [sic] Marketplace." In support of this assertion, defendants attached a complaint filed against it in April 2010 by Strategic Turnaround Equity Partners and an explanation of the over-the-counter stock market from an Internet resource, and asked the circuit court to take judicial notice of UAHC's publicly traded status. In fact, a brief Internet search supports that UAHC stock is publicly traded on the OTCQB Markets. See OTC Markets, <<http://www.otcmarkets.com/stock/UAHC/>> (accessed August 24, 2012). Given this evidence that UAHC shares were "listed on a national securities exchange" and are "regularly traded in a market" regulated by the Financial Industry Regulatory Authority and the United States Securities and Exchange Commission, see <<http://www.otcmarkets.com/otc-101/marketplace-rules/>> (accessed August 24, 2012), plaintiffs' claim is clearly precluded by MCL 450.1489(2). Accordingly, the circuit court correctly dismissed plaintiffs' suit.

When a trial court dismisses a plaintiff's claims pursuant to MCR 2.116(C)(8) or (10), the court must allow the plaintiff "an opportunity to amend" its complaint. MCR 2.116(I)(5). Yet, the circuit court did not present this opportunity to plaintiffs. MCR 2.116(I)(5) excepts the court's duty to allow plaintiff an amendment when "the evidence then before the court shows that amendment would not be justified." *Id.* An amendment is not justified when it would be futile. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000).

On appeal, plaintiffs do not explicitly request the opportunity to amend their complaint. They do, however, claim that they should be permitted to bring an action against defendants for breaching UAHC's articles of incorporation, which amounts to a contract providing the shareholders' rights and the corporation's duties. Plaintiffs have not submitted the articles of incorporation to this Court and we are therefore unable to determine whether plaintiffs' proposed breach-of-contract claim would be futile.

Plaintiffs also argue that they could “seek redress for illegal acts . . . under Chapter 7A” of the business corporation act. Nothing in chapter 7A, MCL 450.1775 *et seq.*, gives shareholders the power to file a direct action for a corporate violation. Moreover, MCL 450.1784(1)(a) provides that the voting provision upon which plaintiffs rely, MCL 450.1780, does not apply to corporations “having fewer than 100 beneficial owners of its stock.” In their appellate brief, plaintiffs assert that UAHC “never had . . . more than approximately 20 non-affiliated shareholders at any one time.” Plaintiffs’ admission establishes that any amendment to allege a violation of MCL 450.1780 would be futile.

Plaintiffs’ last hope to amend their complaint would be to bring a derivative action against the directors on behalf of the corporation pursuant to MCL 450.1491a *et seq.* Plaintiffs repeatedly state in their appellate brief that they do not intend to file a derivative claim. As such, it would be futile to remand to the circuit court to allow plaintiffs an opportunity to amend their complaint in this manner.

As summary disposition would have been proper based on plaintiffs’ reliance upon an inapplicable statute, we need not consider whether plaintiffs had standing to bring a direct action against the corporation or a derivative action on behalf of the corporation against the offending directors.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Donald S. Owens
/s/ Mark T. Boonstra