

STATE OF MICHIGAN
COURT OF APPEALS

JAMES ELSMAN and JANICE ELSMAN,

Plaintiffs-Appellants,

v

STANDARD FEDERAL BANCORPORATION,
STANDARD FEDERAL BANK, THOMAS R.
RICKETTS, GARRY G. CARLEY, RONALD
PALMER, BEVERLY BELTAIRE, ERNEST L.
GROVE, JR., NORMAN P. HAHN, WILLIAM
HOGLUND, JOHN M. OHARA, JACK L. OTTO,
ROBERT G. ROWEN, DAVID P. WILLIAMS,
E.G. WILKINSON, JR., JOSEPH KRUL,

Defendants-Appellees.

UNPUBLISHED
March 26, 1999

No. 206512
Oakland Circuit Court
LC No. 97-542430 CK

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendants. We affirm.

This action arises out of a merger between Standard Federal Bancorporation, Inc., along with its principal subsidiary, Standard Federal Bank (collectively referred to as Standard) and ABN AMRO North America, Inc. (AANA). Pursuant to the terms of the merger, AANA bought all of Standard's outstanding shares of stock. Plaintiffs were minority shareholders in Standard at the time of the merger. They filed this suit on behalf of themselves and other shareholders seeking designation as a class action in an effort to prevent the merger. Their principal objection to the merger was that the stock was being sold at a price much lower than its actual value. In their complaint, plaintiffs alleged that defendants engaged in mismanagement, waste of corporate assets, and diminution of stock value. They asserted claims for fraud, breach of fiduciary duty, constitutional violations, intentional interference with business advantage, and conspiracy.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(5) and (8), arguing that plaintiffs' complaint alleged derivative, not direct, shareholder claims and that plaintiffs had failed to comply with the demand requirement imposed by MCL 450.1493a; MSA 21.200(493a) for bringing derivative claims. The trial court agreed and granted summary disposition in favor of defendants.

On appeal, plaintiffs argue that the trial court erred in granting summary disposition to defendants. We disagree.

A party may move for summary disposition under MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim on which relief may be granted. Only the pleadings may be considered when a motion is based on subrule (C)(8). MCR 2.116(G)(5). Summary disposition is warranted under subrule (C)(8) when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

A party may move for summary disposition under MCR 2.116(C)(5) on the ground that the opposing party lacks the legal capacity to sue. When a motion is premised on subrule (C)(5), the court must consider not only the pleadings, but also any other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition is warranted under subrule (C)(5) when the moving party is entitled to judgment as a matter of law. *In re Quintero Estate*, 224 Mich App 682, 692; 569 NW2d 889 (1997). We review orders granting summary disposition de novo. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

In this case, it appears that the trial court resolved the issue whether plaintiffs' complaint asserted direct or derivative claims solely by reference to the complaint. However, in resolving the issue whether plaintiffs complied with the statutory demand requirement, it appears that the trial court relied on not only the complaint but also factual allegations in the parties' motion, answer and corresponding briefs. The record indicates that these factual allegations were generally unsupported by any documentary evidence except for one exhibit (a fax cover sheet) filed by plaintiffs. Thus, we treat the trial court's decision as having been granted pursuant to MCR 2.116(C)(5).

Plaintiffs contend that the allegations asserted in their pleadings supported a direct shareholder action, not a derivative suit. We disagree. As explained in *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679-680; 444 NW2d 534 (1989) (citations omitted):

In general, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee. . . .

The general rule is inapplicable where the individual shows a violation of a duty owed directly to him. . . . This exception does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally. . . . Thus, where the alleged injury to the individual results only

from the injury to the corporation, the injury is merely derivative and the individual does not have a right of action against the third party.

See also *Daily Income Fund, Inc v Fox*, 464 US 523, 528; 104 S Ct 831; 78 L Ed 2d 645 (1984).

In this case, we find no error in the trial court's conclusion that plaintiffs' claims are derivative inasmuch as they allege violations of duties owed to the corporation that caused injury to the corporation itself. While we recognize that, as a result of the corporation's alleged injuries by virtue of the sale of stock at a price substantially less than what it was worth, plaintiffs were, in turn, indirectly harmed because they received less money for their shares after the merger, the true harm, if any, was sustained by the company and plaintiffs' harm was derivative. *Id.* at 680.

Next, plaintiffs contend that even if their claims are derivative summary disposition was nevertheless inappropriate because they did comply with the statutory written demand requirement before bringing their derivative claims. Plaintiffs contend that they complied with the written demand requirement by faxing a draft of the complaint to the corporation's acting president on the same day that this suit was filed.

MCL 450.1493a; MSA 21.200(493a) provides in pertinent part:

A shareholder may not commence a derivative proceeding until all of the following have occurred:

(a) A written demand has been made upon the corporation to take suitable action.

(b) Ninety days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

In this case, even though the faxed complaint constituted a "written" document we cannot conclude that this written document constituted a "demand . . . upon the corporation to take suitable action." MCL 450.1493a(a); MSA 21.200(493a)(a). Because no written demand pursuant to § 493a(a) occurred in this case, we need not consider plaintiffs' arguments with respect to whether plaintiffs satisfied the requirements of § 493a(b). See, generally, MCL 450.1493a; MSA 21.200(493a) (shareholder may not commence derivative proceeding until *all* of the events specified in subsections [a] and [b] have occurred).

We briefly dispose of plaintiffs' remaining issues. We deem plaintiffs' constitutional arguments inadequately briefed and do not reach them. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). Plaintiffs' sworn complaint, motion answer and brief do not constitute affidavits within the meaning of MCR 2.119(B) because they do not indicate that they were made on the personal knowledge of the affiant, plaintiffs' attorney, or that the affiant, again, plaintiffs' attorney, could himself testify competently to the facts stated therein if sworn as a witness. See MCR 2.119(B)(1)(a) and (b).

Thus, we reject plaintiffs' contention that the trial court should have dismissed the motion for summary disposition on the ground of "unmet affidavits alone." Finally, plaintiffs did not seek leave to amend their complaint. Thus, we need not consider plaintiffs' argument that the trial court's written opinion did not allow them to amend the complaint.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ William C. Whitbeck