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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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LUCILLE GREMMELS, MARK GREMMELS and DEBRA GREMMELS,

Plaintiffs-Appellants,

vs.

COMMUNITY FINANCIAL CORP.; COMMUNITY SAVINGS BANK OF EDGEWOOD, IOWA; ROBERT ARTHUR; and STEVE BRADY,

Defendants-Appellees.

Filed December 17, 1987

7-239
86-1440

Appeal from the Iowa District Court for Delaware County (No. CL 2067), James C. Bauch, Judge.

Plaintiffs Lucille Gremmels and Mark Gremmels appeal from the district court's ruling dismissing their petition for failure to state a claim upon which relief could be granted; defendants cross-appeal from the district court's ruling denying their motion to dismiss with respect to Debra Gremmels' claim. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Peter C. Riley and Sara Riley Brown of the Tom Riley Law Firm, P.C., Cedar Rapids, for plaintiffs-appellants/cross-appellees.

Gary K. Norby, Richard K. Whitty, and Chad C. Leitch of O'Connor & Thomas, P.C., Dubuque, for defendants-appellees/cross-appellants.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

Plaintiffs Lucille Gremmels and Mark Gremmels appeal from the district court's ruling dismissing their petition for failure to state a claim upon which relief could be granted; defendants cross-appeal from the district court's ruling denying their motion to dismiss with respect to Debra Gremmels' claim. We affirm in part, reverse in part, and remand.

In June 1977, Northeast Iowa Equipment, Inc. (NEIE) was formed as a corporation with the ownership being one-third to LaVerne Gremmels, one-third to Mark Gremmels, LaVerne's son, and one-third to Darwin Buhman. In July 1982, Darwin Buhman transferred his interest to Lucille Gremmels, LaVerne's wife. Later in July 1982, LaVerne, Lucille, Mark, and Mark's wife, Debra, met with officials of a local bank, Community Savings Bank, to finalize a Small Business Administration (SBA) loan of $400,000 to NEIE. LaVerne, Lucille, Mark, and Debra personally guaranteed this loan. A portion of the $400,000 was to be used to pay for land and buildings, and the remaining portion of the SBA loan was to be used for future working capital of the corporation.

In July 1983, LaVerne Gremmels committed suicide. A $300,000 shortage in NEIE's inventory was subsequently discovered. It was also discovered that Community Savings Bank had made five loans to NEIE without the knowledge of Lucille, Mark, or Debra, four of these loans being made prior to the SBA loan application. These loans bore only one signature for NEIE, that of LaVerne Gremmels; this situation violated the corporation's bylaws, which required the signatures of at least two corporate officers on all loans and checks.

After the death of LaVerne Gremmels, Community Savings Bank sought to recover the balance of the $400,000 SBA loan from Lucille, Mark, and Debra personally, in reliance on their personal guarantee of NEIE's debts. This prompted Lucille, Mark, and Debra to declare bankruptcy. NEIE is no longer in existence.

Lucille, Mark, and Debra later filed the present suit against Community Savings Bank, two of its officers, and the holding company which controlled it. The plaintiffs alleged that the bank had acted fraudulently at the time the $400,000 SBA loan was made by concealing from Lucille, Mark, and Debra its knowledge of NEIE's true financial condition, including the loans previously made on LaVerne's sole signature. The plaintiffs also alleged that the bank had acted fraudulently in leading the plaintiffs to believe that the $400,000 SBA loan would be used to purchase real estate and cover general operating expenses, rather than to bail NEIE out from financial difficulties known only to LaVerne and the bank. In addition, the plaintiffs alleged fraud in various related matters.

The district court dismissed the petition insofar as Lucille and Mark Gremmels were named as plaintiffs for failure to state a claim upon which relief could be granted. The district court held that Lucille and Mark, as shareholders in NEIE, were not entitled to relief under the general principle that shareholders cannot sue as individuals for a wrong done to the corporation. The court concluded that Debra Gremmels did state a claim upon which relief could be granted since she was not a shareholder in the corporation; therefore, the court did not dismiss that part of the petition which named Debra Gremmels as a plaintiff.

Lucille and Mark have appealed from the district court's dismissal of their petition. They contend they are entitled to sue, in spite of the general rule that a shareholder cannot recover individually for a wrong done to the corporation, because the bank owed them a "special duty" independent of any duty it owed the shareholders of NEIE in general.

The defendants have filed a notice of cross-appeal. They contend the district court erred by declining to dismiss that part of the petition which named

Debra Gremmels as a plaintiff. They also contend the entire petition should have been dismissed for the additional reason that it alleges insufficient facts to support its claims.

Our scope of review is for correction of errors of law. Iowa R. App. P. 4.

I. We first are asked by defendants to consider plaintiffs' issues waived due to their failure to provide a statement of the issues presented for review with authorities considered most pertinent and convincing underlined, as required by rule 14(a)(3), Iowa Rules of Appellate Procedure. That rule states in pertinent part: "Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." (emphasis added).

In Culligan Soft Water Service v. Berglund, 259 Iowa 660, 145 N.W.2d 604 (1966), the appellee failed to cite in its brief any authority in support of the trial court's ruling, contrary to Iowa Rule of Civil Procedure 344. The court held:

> Compliance with the rules assists in our better understanding the issues and the merits of the appeal. We have nevertheless, in keeping with our desire to dispose of appeals on their merits, decided to consider the questions raised on this appeal as we are able to understand them.

Id. at 662, 145 N.W.2d at 605-06. Because the court has discretion in determining whether plaintiffs' issues are deemed waived pursuant to rule 14(a)(3) and for the further reason that even although plaintiffs did not accurately comply with the requirement to provide a statement of the issues with authorities most pertinent underlined, plaintiffs did set out in the body of their argument the issues presented, along with adequate authority to support their position, we believe waiving the plaintiffs' issues on appeal would be too severe a punishment.

II. We next consider whether the trial court erred in dismissing Lucille Gremmels' and Mark Gremmels' petition for failure to state a claim. Defendants argue that NEIE is the real party in interest and the holder of any cause of

action which may have arisen out of the alleged acts of the defendants and that the petition does not allege that the plaintiffs, as individuals, had any transaction with any of the defendants which would form the basis of a cause of action by plaintiffs individually against any of the defendants.

A motion to dismiss for failure to state a claim is sustainable only when it appears to a certainty that the pleader has failed to state a claim upon which relief can be granted under any statement of facts provable under the allegations. Curtis v. Board of Supervisors of Clinton County, 270 N.W.2d 447, 448 (Iowa 1978). In making this determination, the pleadings should be construed in the light most favorable to the pleader with the doubts resolved in his favor and the challenged allegations accepted as true. Citizens for Washington Square v. City of Davenport, 277 N.W.2d 882, 884 (Iowa 1979). In Iowa we have notice pleading; a petition need only contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for relief to which the pleader deems himself entitled. Id. at 883; Iowa R. Civ. P. 69(a).

Plaintiffs' amended petition consists of thirty-two numbered paragraphs reciting the facts on which they base their claim, with approximately the last eight paragraphs referring in some specificity to the alleged fraudulent practices of defendants. Paragraph 30 of plaintiffs' petition states the following:

> As a result of Defendants' fraudulent loan and banking practices, NEIE is no longer in existence and Plaintiffs have been forced into bankruptcy since Defendant Bank sought to recover the loan of NEIE from Plaintiffs personally.

While we find plaintiffs could have cast their petition in more detail with respect to their status of attempting to recover individually rather than in their capacity as shareholders, based on our law that the petition should be construed in the light most favorable to the pleader, we find the language in paragraph 30, particularly the words "defendant bank sought to recover the loan of NEIE from plaintiffs

personally" is sufficient to establish plaintiffs' claim being based on personal damages, rather than damages in their capacity as shareholders, in conformity with our procedural notice pleading requirements.

III. While we find plaintiffs' petition was procedurally adequate, we next need to address whether the fact plaintiffs personally guaranteed the corporate debt creates a personal right of action independent of the harm allegedly suffered by the corporation and whether there was a duty placed upon defendants, the breach of which created a cause of action for plaintiffs individually.

The appropriate rule and exceptions with respect to shareholders' actions in their individual capacities is as follows:

> As a matter of general corporate law, shareholders have no claim for injuries to their corporations by third parties unless within the context of a derivative action. [citations omitted].
>
> There is however, a well-recognized exception to the general rule: a shareholder has an individual cause of action if the harm to the corporation also damaged the shareholder in his capacity as an individual rather than as a shareholder. [citations omitted]. . . . Some [courts] describe the direct injury as a special duty owed to the shareholder. [citations omitted]. In other cases, the direct injury is said to be an injury to the individual separate and distinct from that suffered by the other shareholders. [citations omitted].
>
> Recognizing that these two concepts will usually if not always, overlap, we conclude that the test is best stated in the disjunctive: in order to bring an individual cause of action for direct injuries a shareholder must show that the third party owed him a special duty or that he suffered an injury separate and distinct from that suffered by the other shareholders.

Cunningham v. Kartridg Pak Co., 332 N.W.2d 881, 883 (Iowa 1983) (emphasis added).

Plaintiffs contend that since they personally guaranteed the loans of NEIE, as guarantors of the loan they were owed a fiduciary duty by defendants of honesty and fair dealing. Plaintiffs assert defendant Bank breached that duty 1) by failing to inform them there were four outstanding loans, which loans violated the corporate bylaws, and 2) by misleading plaintiffs to believe that

the SBA loan would be used to buy land and buildings and for future operating capital. They claim they personally guaranteed the SBA loan because they relied upon the Bank's fraudulent misrepresentation. Plaintiffs claim damages for personal injuries, not the injuries of NEIE, based on their bankrupt status due to the defendant Bank holding plaintiffs personally liable for the debts of NEIE. They claim this duty is separate and apart from any duty owed Mark Gremmels and Lucille Gremmels as shareholders of NEIE.

The trial court, in concluding that Lucille and Mark Gremmels failed to state a claim upon which relief may be granted because the alleged injuries were a consequence of their position as shareholders in the corporation, relied on the case of Mullins v. First National Exchange Bank of Virginia, 275 F.Supp. 712, 722 (W.D. Virg. 1967), for the proposition that the fact plaintiffs were personal guarantors of the note executed by the corporation will not suffice to create a right of action independent of the harm suffered by the corporation. We do not agree with the trial court's interpretation of the Mullins case, and we find that case distinguishable from the case at bar. In Mullins, the corporation went into bankruptcy and the corporation's inventory was ordered frozen by the Bank, and the shareholders sued individually; plaintiffs claimed defendant's acts constituted tortious interference with the corporate property and with contractual rights, and plaintiffs also alleged defendants failed to undertake an orderly liquidation of assets. The court ruled that these alleged wrongs belonged to the corporation because the interference was with the property of the corporation. Id. at 722. The Mullins court opined that individual action may be maintained where fraud, deceit, or bad faith may have been imposed; "unless there is direct damage personal to plaintiff, he may not sue in his individual capacity." The Mullins plaintiffs did not allege fraudulent misrepresentation in inducing them to personally guarantee the corporate debts as the plaintiffs

did in the case at hand. Id. The defendant Bank in the present case sought to hold plaintiffs personally liable for the loan, causing them to go into bankruptcy in their individual capacities.

In Sedco International S.A. v. Cory, 522 F.Supp. 254 (S.D. Iowa 1981), the court held the shareholder, Carver, may sue as an individual where the act complained of creates not only a cause of action in favor of the corporation, but also creates a cause of action in favor of the stockholder as an individual where the acts violate a duty arising to the individual. Id. at 314. In that case, the wrong to the shareholder, Carver, was plaintiff's fraudulent inducement of Carver to make substantial loans of operating capital to the corporation of which Carver was a stockholder and with which plaintiff was doing business. The trial court distinguished Sedco from the case at bar because Carver was *a creditor in Sedco as opposed to a guarantor* of the corporation's debts. We decline to place the emphasis on this distinction as the trial court did: Shareholders in both situations were harmed individually as well as in their capacity as shareholders.

Defendants rely on Cunningham, 332 N.W.2d 881, to support their position that plaintiffs may not bring this cause of action in their individual capacities. Cunningham involved a stockholder suing in his individual capacity for alleged damages resulting from the unsatisfactory operation *of a meat processing machine* leased from defendant by the corporation of which plaintiff was a stockholder. The court in Cunningham stated that plaintiff did not show direct injuries but only showed injuries as a consequence of being a shareholder. Id. at 884. Plaintiff in Cunningham made claims for commercial losses; plaintiff's injury was due to the corporation's failure to succeed. There was no showing of personal damage to plaintiff. We find the Cunningham case distinguishable from the case at bar.

In Buschman v. Professional Mens Association, 405 F.2d 659, 663 (7th Cir. 1969), the court held that the plaintiff's cause of action was personal and not derivative since the liability to pay the corporation's indebtedness to the bank was a personal item of damage that did not arise from his status as a stockholder of the corporation. We find that Mark and Lucille Gremmels' liability to pay the corporate indebtedness is a personal item of damage and does not arise from their status as stockholders in the corporation.

We find plaintiffs have shown that defendants owed a duty of honesty and fair dealing to them in their individual capacities and that plaintiffs' alleged injuries are personal and not as a consequence of being shareholders of NEIE. Plaintiffs became personal guarantors on the SBA loan because they relied on the defendant Bank's alleged misrepresentations; the defendant Bank sought to hold them personally responsible for these sums causing them to go into bankruptcy. *These facts demonstrate that plaintiffs Mark and Lucille Gremmels* have a right to sue in their individual capacities. This is further corroborated by the trial court's finding that Debra, who was also a guarantor of NEIE's SBA loan, has a cause of action, which we now affirm. The only difference between Debra and Mark and Lucille is that Debra is not a shareholder. All three plaintiffs should have the opportunity to litigate their claims based on their alleged personal injuries.

IV. Defendants contend the trial court erred by not dismissing the amended petition as it pertains to Community Financial Corporation because there are no operative facts alleged in the petition to demonstrate any relationship to plaintiffs or defendants. We find paragraph 2 of plaintiffs' amended petition which states, "Defendant Community Financial Corp. is a holding company and is an Iowa corporation doing business in Edgewood, Delaware County, Iowa" is sufficient to allege a factual relationship between Community Financial

Corporation and defendant Community Savings Bank of Edgewood. Plaintiffs allege that defendant Community Financial Corporation is a holding company owning 100% of defendant Community Savings Bank. In looking at this issue in a light most favorable to plaintiffs, we find the trial court did not err in refusing to dismiss defendant Community Financial Corporation as a defendant in this case. Iowa case law permits piercing the corporate veil when the corporation is undercapitalized. Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgt. Inc., 519 F.2d 634, 638 (8th Cir. 1975). Plaintiffs feared that defendant Community Financial Corporation would undercapitalize defendant Bank if plaintiffs succeeded in their suit. We thus affirm the trial court in this regard.

Accordingly, we reverse the trial court and order plaintiffs Mark Gremmels' and Lucille Gremmels' claims be reinstated and proceed to trial. We affirm the trial court in allowing plaintiff Debra Gremmels to pursue her claim. We affirm the trial court in not dismissing Community Financial Corporation as a defendant.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.