NORTH STAR CONTRACTING CORPORATION *v.*
THELMA R. ALBRIGHT ET AL.
(AC 36275)

Gruendel, Lavine and Alvord, Js.

Argued January 21—officially released April 7, 2015

(Appeal from Superior Court, judicial district of Waterbury, Complex Litigation Docket, Dooley, J.)

Ira S. Sacks, pro hac vice, with whom was *Steven M. Frederick*, for the appellant (plaintiff).

Richard C. Pepperman II, pro hac vice, with whom were *Ian E. Bjorkman*, and, on the brief, *William B. Monahan*, pro hac vice, for the appellees (defendants).

Opinion

LAVINE, J. The issue in this appeal is whether the plaintiff, North Star Contracting Corporation, is a proper party to bring a shareholder derivative action against the defendants, the members of the board of directors of UIL Holdings Corporation (corporation),[1] on behalf of the nominal defendant, the corporation. The plaintiff appeals from the judgment of the trial court dismissing its action on the ground that the court lacked subject matter jurisdiction. Specifically, the plaintiff contests the court's finding that a conflict of interest precludes the plaintiff from being a fair and adequate representative of the corporation and its shareholders, and therefore, that it is not a proper party to bring this derivative action.[2] We affirm the judgment of the trial court.

"Because we review the trial court's decision to grant a motion to dismiss, we take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . [A] motion to dismiss admits all facts well pleaded and involves any record that accompanies the motion, including supporting affidavits that contain undisputed facts." (Citation omitted; internal quotation marks omitted.) *May* v. *Coffey*, 291 Conn. 106, 108, 967 A.2d 495 (2009).

In its complaint, the plaintiff alleged the following facts. The corporation's wholly owned subsidiary is the United Illuminating Company (company). In 2006, the company entered into a contract with J. William Foley Incorporated (Foley, Inc.) to expand utility services in Fairfield County. In 2009, a dispute arose between Foley, Inc., and the company arising out of this project, and Foley, Inc., commenced a lawsuit (direct action) against the company alleging both contract and tort claims.[3] See *J. William Foley, Inc.* v. *United Illuminating Co.*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X04-CV-09-5035804-S (September 3, 2013). It is undisputed that J. William Foley owns and operates both the plaintiff and Foley, Inc.

On January 2, 2013, the plaintiff purchased shares of the corporation's stock, thereby becoming a shareholder. After the plaintiff became a shareholder of the corporation, and because the company is a subsidiary of the corporation, the plaintiff served a demand letter on the defendants requesting an investigation into the company's improper acts and practices as alleged in the direct action.[4]

On February 21, 2013, the corporation's chief compliance officer responded to the plaintiff's demand letter and stated that the corporation and the audit committee would review the matter. The plaintiff, however, has alleged in its complaint that the defendants failed to

notify it of whether the corporation initiated an independent investigation and the defendants' actions, therefore, constituted a breach of their fiduciary duties. The plaintiff specifically alleged that by failing to investigate, the defendants exposed the corporation to "civil ligation, criminal penalties . . . and/or other severe penalties in the future" and exposed its shareholders to continued liability and financial risk.

Pursuant to General Statutes §§ 33-720 through 33-727, the plaintiff commenced the present shareholder derivative action and filed a complaint dated April 30, 2013. The nine defendants are all members of the corporation's board of directors. The plaintiff demanded judgment against the defendants for: a declaration that the defendants breached their fiduciary duties, an order compelling the defendants to commence an independent investigation into the company's alleged wrongdoings, expenses and costs incurred by the plaintiff in this proceeding, and any additional relief the court deemed just and proper.

On June 27, 2013, the defendants filed a motion to dismiss this action pursuant to Practice Book § 10-30.[5] In their motion to dismiss, the defendants contended that the plaintiff's claims were factually moot, that the plaintiff lacked standing because it was not a shareholder at the time of the alleged misconduct, and that the plaintiff could not "fairly and adequately" represent the corporation's interest because the direct action commenced by the plaintiff's affiliate, Foley, Inc., was pending against the company for the same alleged misconduct. The court granted the defendants' motion to dismiss because the plaintiff "has not established that it is a fair and adequate representative of either [the corporation] or its shareholders." The court, therefore, did not address the defendants' other claimed grounds for dismissal. This appeal followed. Additional facts will be set forth as necessary.

Our standard of review governing motions to dismiss under Practice Book § 10-30 (a) (1) is well settled. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Manning* v. *Feltman*, 149 Conn. App. 224, 230, 91 A.3d 466 (2014).

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless [the party] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue[s] . . . . Stand-

ing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests." (Internal quotation marks omitted.) *May* v. *Coffey*, supra, 291 Conn. 112.

"The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. Practice Book § [10-30 (a) (1)]. [I]t is the burden of the party who seeks the exercise of jurisdiction in [its] favor . . . clearly to allege facts demonstrating that [it] is a proper party to invoke judicial resolution of the dispute." (Internal quotation marks omitted.) *May* v. *Coffey*, supra, 291 Conn. 113.

The plaintiff claims that the court erred in granting the defendants' motion to dismiss on the basis that the plaintiff cannot be a fair and adequate representative of either the corporation or its shareholders, pursuant to General Statutes §§ 52-572j and 33-721. Specifically, the plaintiff argues that the court failed to apply the *Fink*[6] multifactor balancing test to the facts of this case, the court incorrectly relied on *Barrett* v. *Southern Connecticut Gas Co.*, 172 Conn. 362, 370, 374 A.2d 1051 (1977), both the derivative and direct actions do not present a conflict of interest, and the plaintiff does not pose any risk for potential abuse. The defendants challenge the plaintiff's ability to represent fairly and adequately the interests of the other shareholders because the plaintiff's affiliation with the direct action creates an impermissible conflict of interest in this derivative action.

"A shareholder's derivative suit is an equitable action by the corporation as the real party in interest with a stockholder as a nominal plaintiff representing the corporation." Id. As a preliminary inquiry, "the defendants in a derivative action may properly question whether the plaintiff has standing in equity to act as the nominal shareholder acting on behalf of the corporation and the other shareholders." Id., 370. "Particularly in jurisdictions where shareholder suits are common, courts have developed equitable standards to assure procedural fairness. These conditions act as prerequisites that the shareholder must satisfy in order to assert the alleged corporate claim as a representative plaintiff. . . . Among those equitable standards is . . . the requirement that the nominal plaintiff fairly and adequately represent the shareholder on whose behalf he purports to sue." (Citations omitted.) Id., 371.

General Statutes § 52-572j provides in relevant part: "(a) Whenever any corporation or any unincorporated association fails to enforce a right which may properly be asserted by it, a derivative action may be brought by one or more shareholders or members to enforce the right . . . . The derivative action *may not be maintained if it appears that the plaintiff does not fairly*

and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. . . .'' (Emphasis added.) Similarly, General Statutes § 33-721 provides in relevant part: ''A shareholder may not commence or maintain a derivative proceeding unless the shareholder . . . (2) fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.''[7]

''Adequate and fair representation consists of the nominal plaintiff's having interests and issues coextensive with those of the class of shareholders he seeks to represent and being able to assure the trial court that as a representative, he will put up a real fight.'' (Internal quotation marks omitted.) *Barrett* v. *Southern Connecticut Gas Co.*, supra, 172 Conn. 373. In *Barrett*, our Supreme Court held that the nominal plaintiff could not fairly and adequately represent the other shareholders because the plaintiff already had brought an individual action against the corporation. Id., 374. ''The real issue is whether an inquiry of all possible antagonisms between the interests of the representative and those of the class . . . reveals conflicts which make it likely that the interests of the other stockholders will be disregarded in the management of the suit.'' (Citation omitted; internal quotation marks omitted.) Id. We are well aware that *Barrett*, however, ''does not hold that a plaintiff with possible individual claims against the corporation can *never* fairly and adequately represent other shareholders in a derivative action.'' (Emphasis in original.) *Fink* v. *Golenbock*, 238 Conn. 183, 205, 680 A.2d 1243 (1996). The fact-intensive inquiry rests on the standard of the potential for abuse by the plaintiff in bringing both a direct and derivative action. *Barrett* v. *Southern Connecticut Gas Co.*, supra, 377.

In *Fink* v. *Golenbock*, supra, 238 Conn. 205, our Supreme Court identified eight factors for determining whether a plaintiff is a fair and adequate representative: ''(1) whether the named plaintiff is the real party in interest; (2) the plaintiff's familiarity with the litigation and willingness to learn about the suit; (3) the degree of control exercised by attorneys over the litigation; (4) the degree of support given to the plaintiff by the other shareholders; (5) the plaintiff's personal commitment to the action; (6) the remedies sought by the plaintiff; (7) the relative magnitude of the plaintiff's personal interests as compared to the plaintiff's interest in the derivative action itself; and (8) the plaintiff's vindictiveness towards the other shareholders.'' The court further noted that ''the above factors are nonexclusive and interrelated, and that it is frequently a combination of factors that guides a court in determining whether a plaintiff meets the requirements of fair and adequate representation.'' Id., 205–206.

In its memorandum of decision, the court held that

under the *Barrett* and *Fink* analyses, "the plaintiff cannot and does not fairly and adequately represent either the corporation or its shareholders." The court found that the plaintiff's derivative action displayed "many of the risks for abuse identified in *Barrett* and as encompassed within the *Fink* factors." Specifically, the court examined the relationship between the plaintiff and its affiliate, Foley, Inc., and the pending direct action against the company. The court concluded that "[i]n bringing a derivative action seeking to force an investigation into Foley, Inc.'s still pending allegations, (by counsel other than counsel to this litigation) the plaintiff asks [the corporation] to get what is essentially a second legal opinion regarding the merits of the still pending Foley, Inc., [direct action]." The court further concluded that, "[t]he Foley, Inc., claim, if successful, will inure to the direct and inescapable detriment of the corporation or shareholders [the plaintiff] seeks to represent." Specifically, the direct action seeks millions of dollars in damages as a result of the conduct the plaintiff is now trying to have investigated by the corporation.

"Whether a plaintiff is an appropriate representative is fact-specific and depends upon any number of factors." *Fink* v. *Golenbock*, supra, 238 Conn. 205. Our Supreme Court in *Barrett*, and "[o]ther courts have agreed that there is an irreconcilable conflict of interest where an individual is a plaintiff in a stockholders' derivative action seeking recovery on behalf of a corporation and is also a party to another suit attacking the corporation and seeking recovery from it." *Barrett* v. *Southern Connecticut Gas Co.*, supra, 172 Conn. 377.

Here, the court reasoned the fact "[t]hat Foley is the controlling person of both affiliated entities [the plaintiff and Foley, Inc.] cannot be overlooked when assessing the presence of a conflict, the potential for abuse or the *Fink* factors." The court's conclusions turn on whether the conflict of interest gives rise to the potential for abuse as articulated in *Barrett*. "The standard is one of potential for abuse, and thus the plaintiff's averments of good faith and a desire to benefit the corporation cannot overcome the type of conflict which maintenance of both an individual and a derivative action suggests. The kind of assurance demanded by due process and the equitable requirement of adequate and fair representation is that the nominal plaintiff be free of any interests which holds the potential for influencing his conduct of the litigation in a manner inconsistent with the interests of [the] shareholders." (Internal quotation marks omitted.) *Barrett* v. *Southern Connecticut Gas Co.*, supra, 377. The conflict between the simultaneous maintenance of the direct and derivative actions is underscored by the fact that both suits essentially arise out of the same alleged conduct: the conflict between Foley, Inc., and the company is the basis for both the direct action and this derivative action. This is not a case in which the direct and derivative actions

deal with a separate nucleus of fact. Here, the plaintiff brought this derivative action claiming that the corporation failed to investigate the conduct alleged in the direct action. The court noted that the derivative action "could serve to undermine or otherwise impact [the company] and [the corporation's] position in [the direct] litigation and could be construed as a backdoor attempt to manipulate [the company] in the [direct] action brought by Foley, Inc." Given the facts of this case, an inherent conflict exists.

Under the circumstances presented, and in light of its well reasoned memorandum of decision, we agree with the court that the plaintiff has failed to demonstrate that it can be a fair and adequate representative. The court, therefore, properly determined that the plaintiff lacked standing and properly granted the defendants' motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] The defendants are the following members of the corporation's board of directors: Thelma R. Albright, Arnold L. Chase, Betsy Henley-Cohn, Suedeen G. Kelly, John L. Lahey, Daniel J. Miglio, William F. Murdy, Donald R. Shassian, and James P. Torgerson.

[2] On appeal, the plaintiff also claimed that the court should have allowed discovery or an evidentiary hearing prior to dismissing its complaint. The plaintiff withdrew this claim during oral argument before this court.

[3] In October 2012, Foley, Inc., filed a regulatory complaint against the company with the Federal Energy Regulatory Commission (commission), alleging claims similar to those alleged in the direct action. On February 21, 2013, the commission dismissed it without prejudice pending the outcome of the direct action. In the direct action, following a trial to the court, *Bright*, *J.*, rendered judgment in favor of Foley, Inc., in the amount of $1,051,143.30 on one count of breach of contract and in favor of the company on the remaining eight counts. Foley, Inc., filed an appeal, which is pending before this court.

[4] Specifically, the demand letter stated in relevant part: "These alleged improper practices are summarized in the enclosed publicly-filed Second Amended Complaint, filed by J. William Foley Incorporated (Foley) against [the company] before the Federal Energy Regulatory Commission and the enclosed posttrial brief based on the public trial record of the ongoing dispute between Foley and [the company]."

[5] After the defendants filed a motion to dismiss, the plaintiff filed a request to amend its complaint. "Once a party has raised an issue of subject matter jurisdiction, the court must immediately act on it before proceeding to any other action in the case. . . . Therefore, once the [defendants] filed [their] motion to dismiss on the grounds that the court lacked subject matter jurisdiction, the court was required to refrain from acting on the plaintiff's request to amend its compliant." (Citation omitted.) *Cumberland Farms, Inc.* v. *Dubois*, 154 Conn. App. 448, 455 n.7, A.3d (2014). Therefore, the court properly considered the motion to dismiss on the basis of the operative complaint and not the plaintiff's proposed amended complaint.

[6] *Fink* v. *Golenbock*, 238 Conn. 183, 205, 680 A.2d 1243 (1996).

[7] In its memorandum of decision, the court noted that "Connecticut has two statutes which describe the prerequisite for bringing a shareholder derivative proceeding . . . [and] [w]hile the provisions in the two statutes are very similar, the language is not identical."