

X07-HHD-CV-18-6102657-S	:	SUPERIOR COURT
STEVEN W. CAMEROTA INDIVIDUALLY & ON BEHALF OF S. CAMEROTA & SONS, INC.	:	JUDICIAL DISTRICT HARTFORD
V.	:	COMPLEX LITIGATION DOCKET
SALVATORE C. CAMEROTA SR., ET AL.	:	JUNE 7, 2024

HARTFORD J.D.

JUN 07 2024

FILED

MEMORANDUM OF DECISION RE MOTION TO DISMISS (#117)

Before the court is the motion of the defendants, Salvatore Camerota, Frank Camerota, and S. Camerota & Sons, Inc., to dismiss the plaintiff's, Steven Camerota Sr., individually and on behalf of S. Camerota & Sons, Inc., second¹ and third² counts of the complaint. The defendants assert that all of Steven's claims in the second count are derivative claims for which he lacks standing to assert individually, and that Steven's failure to make a pre-suit demand are fatal to both the second and third counts. For the following reasons, the motion to dismiss is denied.

The following facts and procedural history are relevant to the court's decision. The operative complaint is the complaint filed on November 11, 2018. For approximately forty years, the plaintiff owned and co-managed a lucrative family business, S. Camerota & Sons, Inc., with his brothers, Salvatore and Frank Camerota.³ The plaintiff and the individual defendants are the shareholders of the corporation with each holding a one-third interest. The plaintiff and the individual defendants are also each officers of the corporation and constitute the entirety of the corporation's current board of directors. The plaintiff alleges that the individual defendants have

¹ The second count asserts a claim of breach of fiduciary duty and is brought both individually and derivatively.
² The third count seeks judicial removal of the individual defendants as directors and is brought only derivatively.
³ Salvatore Camerota and Frank Camerota will be referred to herein as the individual defendants and individually by name as necessary. S. Camerota & Sons, Inc. will be referred to herein as "the corporation."

engaged in acts of self-dealing, breach of fiduciary duty, misappropriation, and corporate mismanagement. More specifically, the plaintiff has alleged, inter alia, that the individual defendants: (1) blocked the plaintiff's access to corporate information and documents; (2) misappropriated corporate funds; (3) used corporate, rather than personal funds, to make a payment to the plaintiff pursuant to a settlement agreement; (4) failed to properly manage the corporation and take appropriate steps after past incidents of embezzlement by employees; and (5) wasted corporate assets.

The defendants filed the present motion to dismiss seeking to dismiss the second and third counts of the plaintiff's complaint. The defendants first move to dismiss the plaintiff's individual claims in counts two, asserting breach of fiduciary duty, for lack of standing on the ground that the claims are premised on alleged harms solely to the corporation. In the defendants' view, the plaintiff fails to allege any harm to him separate and apart from the harm to the corporation. The defendants further argue that both the second and third count derivative claims should be dismissed because the plaintiff failed to make a demand upon the corporation prior to asserting claims derivatively on behalf of the corporation as required by General Statutes § 33-720, et seq.

The plaintiff argues that demand is not required under the futility doctrine and that the defendants are also barred from asserting that demand was not made under the equitable estoppel doctrine. Moreover, the plaintiff alleges that he has asserted individual harm in the second count and therefore, demand was not required.

"A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *MacDermid, Inc. v. Leonetti*, 310 Conn. 616, 626, 79 A.3d 60 (2013). "A court deciding a motion to dismiss must determine not

the merits of the claim or even its legal sufficiency, but rather, whether the claim is one that the court has jurisdiction to hear and decide.” (Internal quotation marks omitted.) *Hinde v.*

Specialized Education of Connecticut, Inc., 147 Conn. App. 730, 740-41, 84 A.3d 895 (2014).

“[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.”

(Internal quotation marks omitted.) *May v. Coffey*, 291 Conn. 106, 113, 967 A.2d 495 (2009).

“[I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged.” (Internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 650, 974 A.2d 669 (2009).

“Trial courts addressing motions to dismiss . . . pursuant to § 10-31 (a) (1) may encounter different situations, depending on the status of the record in the case. . . . [L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed.” (Citation omitted; footnote omitted; internal quotation marks omitted.) *Conboy v. State*, *supra* 292 Conn. 650-51. The court will consider the complaint supplemented by undisputed facts evidenced in the record and need not hold an evidentiary hearing.⁴

“Standing is the legal right to set judicial machinery in motion. . . . [I]f a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . In addition, because standing implicates the court’s subject matter jurisdiction, the

⁴ “[W]here a jurisdictional determination is not dependent on the resolution of a meaningful factual dispute, there is no requirement that the court conduct a fact-based hearing.” *Countrywide Home Loans Servicing, LP v. Creed*, 145 Conn. App. 38, 47, 75 A.3d 38, cert. denied, 310 Conn. 936, 79 A.3d 889 (2013).

issue of standing is not subject to waiver and may be raised at any time.” (Internal quotation marks omitted.) *Hilario’s Truck Center, LLC v. Rinaldi*, 183 Conn. App. 597, 603, 193 A.3d 683, cert. denied, 330 Conn. 925, 194 A.3d 776 (2018). “If . . . the plaintiff’s standing does not adequately appear from all materials of record, the complaint must be dismissed.” (Footnote omitted; internal quotation marks omitted.) *Burton v. Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542, 550, 23 A.3d 1176 (2011).

“A distinction must be made between the right of a shareholder to bring suit in an individual capacity as the sole party injured, and his right to sue derivatively on behalf of the corporation alleged to be injured. . . . Generally, individual stockholders cannot sue the officers at law for damages on the theory that they are entitled to damages because mismanagement has rendered their stock of less value, since the injury is generally not to the shareholder individually, but to the corporation—to the shareholders collectively. . . . In this regard, it is axiomatic that a claim of injury, the basis of which is a wrong to the corporation, must be brought in a derivative suit, with the plaintiff proceeding ‘secondarily,’ deriving his rights from the corporation which is alleged to have been wronged. . . . It is, however, well settled that if the injury is one to the plaintiff as a stockholder, and to him individually, and not to the corporation, as where an alleged fraud perpetrated by the corporation has affected the plaintiff directly, the cause of action is personal and individual. . . . In such a case, the plaintiff-shareholder sustains a loss separate and distinct from that of the corporation, or from that of other shareholders, and thus has the right to seek redress in a personal capacity for a wrong done to him individually.” (Citations omitted; footnote omitted.) *Yanow v. Teal Industries, Inc.*, 178 Conn. 262, 281-82, 422 A.2d 311 (1979). “The distinction between a direct and derivative action turns on whether the alleged injury sustained . . . is peculiar to [that shareholder] alone or whether, by virtue of harm suffered by the

company, it affects all of the shareholders collectively . . . In the latter situation, the plaintiff must proceed secondarily, deriving his rights from the corporation which is alleged to have been wronged.” (Citation omitted; footnote omitted; internal quotation marks omitted.) *Saunders v. Briner*, 334 Conn. 135, 168-69, 221 A.3d 1 (2019).

The determination of whether a particular claim belongs to a shareholder individually or to the corporate entity involves an examination of each count and an analysis of whether the defendant has demonstrated an injury that is separate and distinct from that of any other shareholder or the corporation. *Guarnieri v. Guarnieri*, 104 Conn. App. 810, 821-22, 936 A.2d 254 (2007). However, “there may be some instances in which the facts of a case give rise either to a direct action or to a derivative action—such as when an act affects both the relationship of the particular shareholder to the corporation and the structure of the corporation itself, causing or threatening injury to the corporation.” *Fink v. Golenbock*, 238 Conn. 183, 202, 680 A.2d 1243 (1996). This is particularly so in closely held corporations.

In the present case, the plaintiffs have alleged that the individual defendants misappropriated corporate funds by causing the corporation to pay their children \$120,000 for no corporate purpose; Compl., ¶ 27; misappropriated funds from the plaintiff’s personal account; id, ¶ 34; failed to protect assets of the corporation by failing to provide oversight and management of the accounting department permitting embezzlement; id, ¶ 59; and failed to distribute profits to shareholders including himself. Id., ¶ 63. These allegations encompass both derivative claims; id, ¶¶ 27 & 59; as well as individual harm. Id., ¶¶ 34 & 63. Because the court concludes that the second count contains both derivative and individual claims, the motion to dismiss is denied.

The defendants next argue that the lack of a pre-suit demand requires the dismissal of both the second and third counts. General Statutes § 33-722 provides: “No shareholder may commence a derivative proceeding until: (1) A written demand has been made upon the corporation to take suitable action; and (2) ninety days have expired from the date delivery of 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 ninety-day period.”

The contours of an adequate pre-suit demand have not been set by Connecticut appellate authority. Our Supreme Court has explained that “[i]n the context of a shareholder derivative dispute, a ‘demand’ is a mechanism for a shareholder to voice his objection regarding the management of a corporation and place the board of directors on notice of his complaints prior to the filing of a formal shareholder derivative lawsuit. The purpose of requiring a precomplaint demand is to protect the directors’ prerogative to [act]. . . . Thus, the demand requirement implements the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders.” (Citation omitted; internal quotation marks omitted.) *Stutz v. Shepard*, 279 Conn. 115, 119 n.5, 901 A.2d 33 (2006), citing *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 101, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991). There are no allegations that the plaintiff made a pre-suit demand.

Neither Connecticut’s appellate courts nor the Second Circuit Court of Appeals have addressed whether there is a common-law futility exception to the demand requirement of § 33-722. This court has previously adopted the position that futility can be found, and excuses a pre-suit demand, where a plaintiff alleges facts from which the court can infer demand futility,

especially where the other individual corporate shareholders in the closely held entity are directly involved in the alleged wrongdoing. *Polinsky v. Trask*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-21-6152602-S, 2023 WL 2495727, *3 (March 10, 2023, *Noble, J.*). The court sees no reason to deviate from this position.

In the present complaint, the plaintiff has alleged that Salvatore advised the plaintiff to sue him over misappropriation of corporate funds; Compl., ¶ 40; and that he was removed from his position as a director as a retaliatory response to his inquiries into corporate wrongdoings and requesting corporate records. *Id.*, ¶ 77. The court finds these facts sufficient to infer that a pre-suit demand was futile and therefore denies the motion to dismiss on these grounds.⁵

For the foregoing reasons, the defendants' motion to dismiss is denied.

THE COURT

/s/ #435707
Cesar A. Noble
Judge, Superior Court

⁵ Because the court finds that demand was futile, it declines to address the plaintiff's argument that the defendants are also barred from asserting that demand was not made under the equitable estoppel doctrine.