

STATE OF MICHIGAN
COURT OF APPEALS

GREGORY G. COPPOLA,

Plaintiff-Appellant,

v

STEVE MANNING, MICHAEL GROSS,
ALBERT KIM, NOAH WALLEY, JEFFREY
BOCAN,

Defendants-Appellees,

and

ERIC FORSTER,

Defendant.

UNPUBLISHED
November 17, 2015

No. 323994
Washtenaw Circuit Court
LC No. 14-000898-CZ

Before: GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM.

The present case involves claims that defendants, former directors and officers of ReCellular, Inc., breached the fiduciary duties they owed to ReCellular. Suit has been brought by Gregory Coppola, a court-appointed receiver. Currently, Coppola appeals as of right the trial court's order granting summary disposition to defendants under MCR 2.116(C)(7) and (C)(8). Because we conclude that Coppola has stated a cause of action for breach of fiduciary duty, that Coppola has standing to pursue these claims in his role as receiver, and that defendant Steven Manning was not released from liability for these claims, we reverse and remand for further proceedings.

ReCellular was founded in 1991, and it specialized in collecting, repurposing and distributing used cellular telephones. Defendants are former officers and directors of ReCellular. Perhaps most notably, Steve Manning served as ReCellular's Chief Executive Officer (CEO) and chairman of the board from May 2009 until November of 2013. According to Coppola's allegations, in general terms, under Manning's tenure as CEO, with the complicity of the other defendants, ReCellular began taking on excessive debt to support an imprudent plan of aggressive expansion that placed insurmountable strain on ReCellular's operations and contributed to its downfall. Further, Coppola maintains that defendants provided excessive executive compensation to the detriment of the corporation. Then, when it became clear that

ReCellular would not survive, the decision was made to sell the company, but, despite this new plan, Manning and the other defendants failed to prepare the company for a favorable sale. They did not maintain adequate company records, they did not take steps to minimize debt, and, as a result of the company's unfavorable financial outlook and poor recordkeeping, at least one sale fell through following the seller's due diligence examination of ReCellular.

Notably, among the debts taken on by ReCellular were multimillion dollar loans procured from MidCap Business Credit LLC ("MidCap") and NXT Capital SBIC, LP ("NXT"). ReCellular went into default on the loans owing to both MidCap and NXT. As a result, ReCellular eventually entered into an agreement with these lenders and a stipulated court order was entered which appointed Coppola receiver of ReCellular's property. Following Coppola's appointment, he examined ReCellular's records and concluded that, in his opinion, defendants had "grossly mismanaged" the company. Consequently, based on defendants' purported mismanagement, Coppola retained legal counsel and, acting in his capacity of receiver, Coppola filed the present lawsuit against defendants. Coppola's complaint alleges that defendants mismanaged the company and, more particularly, that they breached the fiduciary duties they owed to ReCellular as officers and directors.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8), which the trial court granted. Consistent with the arguments advanced by defendants, the trial court concluded that Coppola ultimately represented MidCap and NXT. Based on this conclusion, the trial court reasoned (1) that Coppola lacked standing because he was not a shareholder and yet he was attempting to pursue a lawsuit that "amounts to a shareholder's derivative action," (2) that Coppola had failed to state a cause of action because he had failed to cite any caselaw or statutory authority to show that officers and directors could be sued for breach of fiduciary duty other than derivatively by shareholders, meaning officers and directors could not be sued by the company, a receiver, or creditors, and (3) that Manning in particular was entitled to summary disposition because of a release signed by MidCap and NXT. Coppola now appeals as of right.

On appeal, Coppola argues that the trial court erred by granting defendants' motion for summary disposition. Specifically, Coppola asserts that defendants and the trial court have fundamentally misunderstood his role as receiver. According to Coppola, a corporation may sue its directors and officers for breach of fiduciary duties. As receiver, Coppola maintains that he has the authority to sue and that he stands in ReCellular's shoes for purposes of pursuing claims on behalf of the receivership. In these circumstances, Coppola contends that he has standing to pursue claims for breach of fiduciary duty and that he has stated a cause of action sufficient to survive a motion under MCR 2.116(C)(8). Finally, because Manning's release pertained to liability Manning owes MidCap and NXT, Coppola argues that this release does not prohibit Coppola from suing Manning in relation to duties Manning owed to ReCellular.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Cichewicz v Salesin*, 306 Mich App 14, 21; 854 NW2d 901 (2014). Whether a party has standing poses a question of law which this Court reviews de novo. *In re Complaint of MCTA*, 241 Mich App 344, 360; 615 NW2d 255 (2000). Likewise, the interpretation of a release to determine whether it bars a plaintiff's claims is a question of law that is reviewed de novo.

Radu v Herndon & Herndon Investigations, Inc, 302 Mich App 363, 374; 838 NW2d 720 (2013).

When a release bars a plaintiff's claims, summary disposition is properly granted under MCR 2.116(C)(7). *Radu*, 302 Mich App at 373-374. When reviewing a motion granted under MCR 2.116(C)(7), appellate courts "consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other appropriate documents specifically contradict it." *Kuznar v Raksha Corp*, 481 Mich 169, 175-176; 750 NW2d 121 (2008). In comparison, a motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and it is properly granted when the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004) (citation omitted). When considering a motion under MCR 2.116(C)(8), the court may consider only the pleadings. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). All well-pleaded factual allegations must be accepted as true and construed in a light most favorable to the nonmoving party. *Id.*

In reviewing whether the trial court erred in this case by granting defendants' motion for summary disposition, we consider first the nature of a breach of fiduciary claim and whether such an action may only be brought against officers and directors by a shareholder in a derivative action. Generally speaking, "[w]hen a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 43; 698 NW2d 900 (2005). "[A] fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 580-581; 603 NW2d 816 (1999). Whether a fiduciary relationship exists is a question of law. *Prentis Family Foundation*, 266 Mich App at 43. If there is a fiduciary relationship, a claim for breach of fiduciary duty may arise "when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Teadt*, 237 Mich App at 581.

Relevant to the present dispute, it has long been the rule in Michigan that directors and officers owe a fiduciary duty to corporations and corporate shareholders. See *Wagner Elec Corp v Hydraulic Brake Co*, 269 Mich 560, 564; 257 NW 884 (1934); *Prod Finishing Corp v Shields*, 158 Mich App 479, 485; 405 NW2d 171 (1987). Specifically, the duties owed by directors and officers are expressly set forth by statute in MCL 450.1541a, which states:

- (1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:
 - (a) In good faith.
 - (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
 - (c) In a manner he or she reasonably believes to be in the best interests of the corporation.

(2) In discharging his or her duties, a director or officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by any of the following:

(a) One or more directors, officers, or employees of the corporation, or of a business organization under joint control or common control, whom the director or officer reasonably believes to be reliable and competent in the matters presented.

(b) Legal counsel, public accountants, engineers, or other persons as to matters the director or officer reasonably believes are within the person's professional or expert competence.

(c) A committee of the board of which he or she is not a member if the director or officer reasonably believes the committee merits confidence.

(3) A director or officer is not entitled to rely on the information set forth in subsection (2) if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) unwarranted.

(4) An action against a director or officer for failure to perform the duties imposed by this section shall be commenced within 3 years after the cause of action has accrued, or within 2 years after the time when the cause of action is discovered or should reasonably have been discovered, by the complainant, whichever occurs first.

Breach of the duties set forth in MCL 450.1541a can give rise to a claim for a breach of fiduciary duties against officers and directors. See *Estes v Idea Engg & Fabrications, Inc*, 250 Mich App 270, 285; 649 NW2d 84 (2002). The aim of such an action is to “redress wrongs to the corporation.” *Id.* at 282. An action under this section may be brought by “a corporation suing for breach of a duty to the corporation *or* a shareholder suing derivatively on behalf of the corporation.” *Id.* at 285 (emphasis added). See also MCL 450.1261(b) (providing that a corporation has the power to “sue and be sued . . . in the same manner as natural persons”); MCL 450.1492a (discussing prerequisites to derivative shareholder actions).

In other words, contrary to defendants’ arguments and the trial court’s framing of the matter, a corporation such as ReCellular may file suit against officers and directors for breach of their fiduciary duties. See MCL 450.1261(b); MCL 450.1541a. Such a cause of action has been long recognized in Michigan and it remains viable under the current version of MCL 450.1541a.¹

¹ We note that Coppola failed to expressly reference MCL 450.1541a in his complaint. However, this does not render Coppola’s complaint insufficient because, even when there is a statutory basis for a claim, “a complaint need not explicitly refer to a statute to bring a claim under that statute.” *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 576; 753 NW2d 265 (2008). While not referring explicitly to MCL 450.1541a, Coppola’s complaint did

See *Estes*, 250 Mich App at 285. See also *Prod Finishing Corp*, 158 Mich App at 484; *Rapistan Corp v Michaels*, 203 Mich App 301; 511 NW2d 918 (1994); *Detroit Gray Iron & Steel Foundries, Inc v Martin*, 362 Mich 205; 106 NW2d 793 (1961). In short, Coppola did not necessarily have to be a shareholder to pursue claims against defendants because it is clear that a corporation may directly file suit to enforce the fiduciary duties owed under MCL 450.1541a. See also MCL 450.1261(b).

Having determined that a corporation may file suit for a breach of fiduciary duty by its officers and directors, the question becomes whether Coppola, acting as a receiver, may pursue such claims on behalf of ReCellular. As codified in MCL 600.2926, circuit courts, “in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law.” Once appointed, a receiver acts as “an arm of the court,” who must remain “unbiased and impartial.” *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 392; 853 NW2d 421 (2014). In other words, a receiver is not appointed as an agent of, or for the benefit of one party in particular; rather he or she is appointed “to protect and benefit both parties equally.” *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 528; 730 NW2d 481 (2007). See also MCR 2.622(A).

A receiver’s specific authority to act is derived from “statute and court rules and from the order of appointment and specific orders which the appointing court may thereafter make.” *Band v Livonia Assoc*, 176 Mich App 95, 108; 439 NW2d 285 (1989) (citation omitted). See also MCL 600.2926. Relevant to the present dispute, pursuant to MCR 2.622(E)(1), “[e]xcept as otherwise provided by law or by the order of appointment, a receiver has general power to sue for and collect all debts, demands, and rents of the receivership estate,² and to compromise or settle claims.” When taking control of an entity’s property, a receiver is said to “stand in the shoes” of the entity in receivership, and thus the receiver can pursue claims that could be pursued by that entity. See *In re Receivership of 11910 S Francis Rd (Price v Kosmalski)*, 492 Mich 208, 226 n 39; 821 NW2d 503 (2012); *HG Vogel Co v Original Cabinet Corp*, 252 Mich 129, 132; 233 NW 200 (1930); *Stram v Jackson*, 248 Mich 171, 183; 226 NW 888 (1929). See also 65 Am. Jur. 2d Receivers § 115; *Wuliger v Manufacturers Life Ins Co*, 567 F3d 787, 795 (CA 6 2009). In other words:

The general rule is that a receiver takes the rights, causes, and remedies which were in the individual or estate whose receiver he or she is or which were available to those whose interests he or she was appointed to represent. A receiver stands in the shoes of such person or estate and can enforce only such rights and contracts or maintain only such action or defense as could be enforced or maintained by such person or estate. [75 CJS Receivers § 392.]

adequately describe the duties owed by defendants with respect to ReCellular and the complaint made specific reference to “Michigan statutory and common law” duties. We find Coppola’s allegations and statements of fact sufficient to inform defendants of the nature of the claims they were being called to defend. See MCR 2.111(B)(1).

² The receivership estate “means the entity, person, or property subject to the receivership.” MCR 2.622(A).

Further, when a receiver has authority to sue on behalf of the receivership entity, the receiver is considered the real party in interest and he or she is permitted to initiate suit in his or her own name. See *Stephenson v Golden*, 279 Mich 710, 762; 276 NW 849 (1937); *McPherson v Gregory*, 271 Mich 580, 583-584; 260 NW 767 (1935).

In this case in particular, aside from the general power to sue possessed by a receiver in Michigan under MCR 2.622(E)(1), the order appointing Coppola as the receiver broadly stated that he was appointed as receiver “for the purposes of taking immediate possession and control of all of [ReCellular’s] funds, real and personal property, books and records, contracts, accounts and accounts receivable and other assets, whether owned or leased, wherever located and by whomever held, including all proceeds, products or profits of such property and assets, and managing and operating the day to day operations of [ReCellular].” Among the powers specifically enumerated in the order appointing Coppola was the authority “to preserve and protect the real and personal property of [ReCellular],” to carry on the operations of the business, to sell assets, to hire attorneys and other professionals, and, most notably, “to *initiate*, prosecute, defend, compromise, intervene in or become party to such legal actions or proceedings as the Receiver deems appropriate to carry out his duties.”

Given a receiver’s general authority to sue set forth in MCR 2.622(E)(1) and Coppola’s specific authority, as set forth in the court’s order, to initiate lawsuits that he deems appropriate to carry out his duties, it follows that Coppola had authority to initiate the current lawsuit to enforce ReCellular’s claims for breach of fiduciary duty against its officers and directors. That is, Coppola has taken possession of ReCellular’s assets. He has been charged with the protection of those assets and he has been empowered to initiate legal action that he deems necessary to carry out his duties. As a general proposition, legal actions belonging to an entity are considered property or assets. See *Young v Indep Bank*, 294 Mich App 141, 144; 818 NW2d 406 (2011). It follows that, as a receiver, Coppola had both the authority and obligation to initiate lawsuits for the protection and preservation of ReCellular’s assets, including any cause of action it may hold against its former directors and officers. See 75 C.J.S. Receivers § 384. When pursuing such actions, Coppola does not act as an agent of, or for the benefit of, NXT or MidCap. See *Ypsilanti Fire Marshal*, 273 Mich App at 528. Rather, Coppola may sue in his own name and, when he sues to enforce a cause of action belonging to ReCellular, he stands in the shoes of ReCellular. See *McPherson*, 271 Mich at 583-584; *Wuliger*, 567 F3d at 795. In sum, as receiver, Coppola had standing to pursue lawsuits on behalf of ReCellular for the purpose of protecting the receivership estate and, because ReCellular could pursue a claim against defendants for breach of the duties under MCL 450.1541a, it follows that Coppola may pursue such a claim in his role as receiver.³

³ On appeal, defendants claim that, even if Coppola has standing to bring claims involving a breach of fiduciary duty, they are nonetheless entitled to summary disposition because their conduct is protected by the business judgment rule. Although the trial court referenced the business judgment rule in its ruling, it did not determine whether this rule applied to the present facts, meaning that defendants’ argument in this regard is unreserved and need not be considered. See *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005).

Finally, bearing in mind Coppola's role as a receiver, who does not act as an agent for MidCap and NXT, we also conclude that Manning's release does not bar Coppola's claims in the present suit. A release is treated as a contract, subject to the rules of contract interpretation. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Id.* at 660. Consequently, "[t]he scope of a release is governed by the intent of the parties as it is expressed in the release." *Cole v Ladbroke Racing Mich, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). "If the language is unambiguous, it must be construed, as a whole, according to its plain and ordinary meaning." *Radu*, 302 Mich App at 374.

In this case, ReCellular entered into an agreement with MidCap and NXT that involved the appointment of a receiver. In this agreement, ReCellular agreed to waive any defenses it might have against MidCap and NXT. Further, this agreement included a provision calling for ReCellular's officers and directors individually, including Steve Manning, "to exchange mutual releases *with the Lenders*." Steve Manning and one other individual executed such releases,⁴ which were then attached to the agreement between ReCellular, MidCap and NXT. The relevant language from Manning's release provides as follows:

[T]he *Lenders* together with their successors and assigns do hereby unconditionally remise, release, and forever discharge Stephen Manning of and from any and all manner of actions, causes of action, suits, claims, counterclaims, liabilities, obligations, defenses, and demands whatsoever, both at law or in

Further, defendants arguably waived any such argument in relation to their motion for summary disposition when their trial counsel stated at the hearing on their motion that "we weren't saying that the - - Business Judgment Rule in and of itself stood as a ground to dismiss the lawsuit, it's probably too entangled with the actual questions." See *Braverman v Granger*, 303 Mich App 587, 608; 844 NW2d 485 (2014). In any event, viewing Coppola's complaint in a light most favorable to Coppola, we conclude that he has set forth more than conclusory allegations against defendants so as to survive application of the business judgment rule at this juncture. See *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 271-272; 671 NW2d 125 (2003). That is, Coppola alleges that defendants' conduct was not undertaken in good faith, that they did not exercise prudent care in the performance of their duties, and that they could not reasonably have believed their conduct was in the best interests of ReCellular. Coppola supports these general assertions in his complaint with factual allegations, including, for example, assertions of excessive and unwarranted compensation that depleted the corporation's coffers to the benefit of Manning and the detriment of the corporation, new and imprudently excessive debt that damaged the company's goodwill and value (and that was taken on against the advice of the company's founder based on "misleadingly optimistic" growth projections prepared by the board which were contrary to the actual state of the company), as well as substandard recordkeeping which hindered efforts to sell the company and resulted in the loss of a potential buyer. In short, accepting the allegations in the complaint as true, Coppola has alleged conduct by defendants that cannot be excused on the face of the complaint as a simple matter of business judgment. In these circumstances, defendants are not entitled to summary disposition under MCR 2.116(C)(8).

⁴ Manning is the only defendant in this case who executed a release, meaning that the release issue does not involve the other defendants in this case.

equity, if any which *any of said Lenders* ever had or now has for or by reason of any cause, matter, or thing whatsoever, arising from the beginning of the world to the date of execution of this Agreement, including, without limitation, any claims relating to Stephen Manning's actions as an officer or director of the Borrower. [Emphasis added.]

In exchange, Manning also released MidCap and NXT from any claims whatsoever, including those relating to loans made by MidCap and NXT to ReCellular.

Manning does not suggest on appeal that this release language is ambiguous. To the contrary, he claims that the release is unambiguous and that, because it applies to "any and all" claims, it releases Manning from liability that might attach in the present suit brought by Coppola. The basic flaw with this argument is that it ignores the plain language of the release and again misconstrues Coppola's role as receiver as well as the nature of the claims Coppola has brought in the present lawsuit. That is, Manning's release unambiguously relates only to claims that MidCap and NXT might bring against Manning. The release refers specifically and repeatedly to the release of liability by "the lenders," and it gives absolutely no indication that ReCellular, i.e., "the borrower," has released Manning from any liability Manning might owe to ReCellular.

Clearly, had MidCap and NXT attempted to file suit against Manning, this release would entitle him to summary disposition. But, the present suit has not been brought by MidCap and NXT, nor is Coppola an agent of MidCap and NXT. See *Ypsilanti Fire Marshal*, 273 Mich App at 528. Rather, Coppola is, as discussed, acting as a receiver in relation to ReCellular's property and the present suit involves claims of breach of fiduciary duty owed by Manning to ReCellular. In other words, Coppola is not attempting to assert rights or claims held by the lenders, and as the receiver he is not acting as an agent of MidCap or NXT. Instead, Coppola has the authority to bring suit on behalf of the receivership estate, and when he does so, he stands in ReCellular's shoes insofar as he asserts claims belonging to ReCellular. See MCR 2.622(E)(1); *In re Receivership of 11910 S Francis Rd*, 492 Mich at 226 n 39; *Wuliger*, 567 F3d at 795. Because the release does not bar ReCellular from pursuing claims against Manning, and because Coppola stands in ReCellular's shoes for the purposes of this lawsuit, the release does not prevent Coppola from pursuing claims of breach of fiduciary duty against Manning for those duties Manning owed ReCellular. Consequently, the trial court erred by granting summary disposition to Manning based on this release.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Joel P. Hoekstra
/s/ Michael J. Kelly