

RETURN DATE: MARCH 13, 2001 : SUPERIOR COURT  
: :  
CONSTANTINE ZESSOS : JUDICIAL DISTRICT OF HARTFORD  
and EUGENIA ZESSOS : :  
: :  
v. : AT HARTFORD  
: :  
COMPANIONS AND HOMEMAKERS, :  
INC and LINDA JOHNSON : December 24, 2007

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS' MOTION TO DISMISS**

**INTRODUCTION**

Plaintiffs brought the above-captioned breach of contract action following defendant Companion and Homemakers, Inc.'s (hereinafter "Companions") failure to make regular monthly payments pursuant to a deferred compensation agreement (hereinafter "the Agreement") between the parties. Defendants have filed a counterclaim that alleges, *inter alia*, that the Agreement was (1) a violation of plaintiff Constantine Zessos' (hereinafter "Zessos") fiduciary duty to defendant Linda Johnson (hereinafter "Johnson") (Count One); (2) a violation of Zessos fiduciary duty to defendant Companions (Count Two); and (3) a Director's Conflicting Interest Transaction within the meaning of Connecticut Business Corporation Act, C.G.S. § 33-781 *et seq.* See Counterclaim. This court should dismiss Count One of the counterclaim because Johnson does not have standing to bring a personal action for breach of fiduciary duty against Zessos based on the Agreement.

**ORAL ARGUMENT REQUESTED**

**TESTIMONY NOT REQUIRED**

## **FACTUAL BACKGROUND**

Counterclaim plaintiff Companions provides non-medical, in-home care to the elderly. Counterclaim, ¶ 1. Counterclaim plaintiff Linda Johnson is the President and sole shareholder of Companions. Id., ¶ 2. Companions employed counterclaim defendant Zessos from late 1991 until April 1, 1998. Id., ¶¶ 3, 21. On April 1, 1998, in order to induce Zessos to retire, Companions agreed to pay Zessos \$ 150,000 per year in monthly installments of \$ 12,500 for the rest of his life and, upon his death, to pay his wife \$ 75,000 per year in monthly installments for the rest of her life (“the Agreement”). Id., ¶ 36. Counterclaim plaintiffs allege that Zessos breached a fiduciary duty by entering the Agreement because the Agreement was allegedly “grossly unfair to Companions & Homemakers and Linda Johnson” in that it “solely benefited [sic] Dean Zessos” and rendered Companions insolvent. Id., Count One, ¶ 44; Count Two, ¶46. Counterclaim plaintiffs also allege that Zessos breached a fiduciary duty to them by “looting from the corporation . . . over \$ 500,000 in improper expenses” during his employment. Id., Count One, ¶ 44; Count Two, ¶46.

Johnson has not alleged that Zessos harmed her, individually, in any manner separate and distinct from Companions. She does not allege that the Agreement or alleged looting harmed her directly and independently of the corporation.

## **ARGUMENT**

### **I. STANDARD FOR GRANTING MOTION TO DISMISS ON STANDING**

#### **GROUND**

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he 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." Ardmare Construction Co. v. Freedman, 191 Conn. 497, 501, 467 A.2d 674 (1983). Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. See Housing Authority v. Local 1161, 1 Conn. App. 154, 157, 468 A.2d 1251, cert. denied, 192 Conn. 802, 471 A.2d 244 (1984). "[S]tanding does not hinge on whether the plaintiff will ultimately be entitled to obtain relief on the merits of an action, but on whether he is entitled to seek the relief . . ." Lewis v. Swan, 49 Conn. App. 669, 675, 716 A.2d 127 (1998).

"The burden rests on the plaintiff to allege a recognizable cause of action . . . Such a requirement embodies the principle that in any action the complaint is required to set forth facts on the basis of which, if true, the plaintiff may be able to establish in law a right to relief, for unless that is done, the pleading is demurrable." (Citations omitted; internal quotation marks omitted.) McAnerney v. McAnerney, 165 Conn. 277, 282, 334 A.2d 437 (1973). In this case, counterclaim plaintiff Johnson has failed to set forth facts which establish her right to relief, individually, based on counterclaim defendant Zessos' alleged breach of fiduciary duty. Consequently, the court should dismiss Count One of the counterclaim.

## II. JOHNSON DOES NOT HAVE STANDING

The basis for Johnson's claim of breach of fiduciary duty is the alleged looting of corporate funds and an Agreement that obligates the corporation to make monthly payments and thereby allegedly renders the corporation insolvent. Counterclaim, ¶ 41 & Count One, ¶44, Count Two, ¶ 46. A claim of injury the basis of which is a wrong to a corporation may be brought only by or on behalf of the corporations and not by its shareholders to recover on their own behalf. Yanow v. Teal Industries, Inc., 178 Conn. 262, 281, 422 A.2d 311 (1979). In order to have standing to sue personally, the plaintiff must allege an injury **separate and distinct from the corporation**; she must establish that the misconduct injured her **directly and independently of the corporation**. Id.; Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, 1997 Conn. Super. LEXIS 178 at \* 25-26 (January 27, 1997) (Hale, J.) (Dismissing claims, including breach of fiduciary duty, of individual principals); Sankaran v. Jarvis, 1995 Conn. Super. LEXIS 87 at \* 7-8 (January 10, 1995) (Handy, J.) (Granting motion to dismiss shareholder's individual action for breach of fiduciary duty on standing grounds).<sup>1</sup>

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<sup>1</sup> Conn. Super. LEXIS 869 at \*3-4 (February 28, 1995) (Handy, J.) ("plaintiff had no standing to sue [the] two See also Lintz v. Avis-Vieira, 1998 Conn. Super. LEXIS 3398 at \* 7 (December 4, 1998) (Karazin, J.) (Granting motion to strike complaint where plaintiff failed to allege an individual harm distinct from the corporation); Sankaran v. Jarvis, 1995 individual defendants . . . for damage they allegedly caused to the corporation which then

In this case, Johnson has not alleged any separate, distinct, direct, or independent injury from the corporation. Indeed, even in the count that purports to apply to her, individually, Johnson treats her injury as coextensive with the injury to the corporation . See Counterclaim, Count One, ¶ 44 (alleging the Agreement was “grossly unfair to Companions & Homemakers and Linda Johnson”), ¶ 45 (alleging that Zessos conduct “regarding the Agreement was in . . . disregard of the rights of Companions & Homemakers and Linda Johnson”); ¶ 46 (alleging that, as a result of Zessos’ conduct, “Companions & Homemakers and Linda Johnson have been damaged.”) Additionally, Johnson has alleged the same conduct as comprising the breach of fiduciary duty to both herself and the corporation. Compare Counterclaim, Count One, ¶ 44 & Count Two, ¶ 46.

Under these circumstances, as in Beverly Hills Concepts, Inc., and Sankaran, supra, this court should dismiss the claim of Johnson as an individual.

## **CONCLUSION**

For the foregoing reasons, counterclaim defendants respectfully request that the Court grant their Motion to Dismiss Count One of the Counterclaim.

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resulted in damage to the plaintiff.”); Litman v. Prudential-Bache Properties, Inc., 611 A.2d 12, 1992 Del. Ch. LEXIS 28 at \* 9-11 (1992) (granting motion to dismiss claims individual claims); Kramer v. Western Pac. Indus., Inc., 546 A.2d 348, 351, 1988 Del. LEXIS 257 (Del.Supr., 1988) (holding that a claim for breach of fiduciary duty and waste of corporate assets was wholly derivative and dismissing claims by individuals).

PLAINTIFFS,  
CONSTANTINE ZESSOS and  
EUGENIA ZESSOS

By

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