IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In Re

SEASIDE ENGINEERING & SURVEYING, INC.,

Debtor.

Case No.11-31637-11-JCO
Chapter 11

VISION-PARK PROPERTIES, LLC, Individually and derivatively on behalf of SEASIDE ENGINEERING & SURVEYING, INC.,

Plaintiff,

v.

Adversary Proceeding No. 12-03007-HAC

JOHN C. GUSTIN, JAMES B. MAINOR, JAMES L. BARTON, ROSS S. BINKLEY, TIMOTHY D. SPEARS, and GULF ATLANTIC ENGINEERING & SURVEYING, LLC,

Defendants.

REPORT AND RECOMMENDATION TO THE DISTRICT COURT ON DEFENDANTS' AMENDED JOINT MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the defendants' amended joint motion for summary judgment (doc. 158). The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157(c)(1) and 1334 and the order of reference of the district court. This adversary proceeding is a non-core proceeding, the claims constitute "related to" matters, and the parties have not stipulated to the entry of a final order by the bankruptcy court. The Court thus submits to the district court the following report and recommendation of proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157(c) and Bankruptcy Rule 9033. For the reasons

stated in the report, the Court recommends that summary judgment be entered in favor of the defendants.

Procedural History

Plaintiff Vision-Park Properties, LLC ("Vision-Park") brings this action as a former shareholder of the liquidated Chapter 11 debtor Seaside Engineering and Surveying, Inc. ("Seaside"). The defendants are the other former shareholders and directors of Seaside and the reorganized company, Gulf Atlantic Engineering & Surveying, Inc. ("Gulf"), which obtained the assets of Seaside pursuant to its confirmed Chapter 11 plan.

The complaint as last amended (doc. 67)[1] contains six counts: Count One for acts of fraud, concealment, self-dealing and deliberate waste of Seaside's corporate assets; Count Two for breach of fiduciary duty; Count Three for breach of a duty of loyalty; Count Four for declaratory judgment that the defendants have no rights to the assets and profits of Seaside; Count Five for an alleged squeeze-out of Vision-Park and devaluation of its stock; and Count Six for fraudulent transfer of Seaside's assets to the reorganized Gulf. Vision-Park withdrew Count Four in its response to the defendants' amended joint motion for summary judgment. [Doc. 163, p. 38.]

Vision-Park moved to withdraw the reference. [Doc. 26.] The district court granted the motion in part but held that "[t]he question of whether the adversary claims are in fact moot in light of the terms of the confirmed reorganization plan should be determined in the first instance by the bankruptcy court." [Doc. 59, p. 3.] The district court instructed the bankruptcy court to resolve any pretrial matters before referring the case back for trial. [Id.]

[1] References to pleadings in this adversary proceeding, No. 12-03007, will be referred to simply as "Doc. ___." Pleadings in the Chapter 11 administrative case, No. 11-31637, will be referred to as "Admin doc. ___."

The bankruptcy court then stayed the action until all appeals of the confirmation order in the Chapter 11 case, Case No. 11-31637, were exhausted. [Doc. 134.] The district court and the Eleventh Circuit affirmed the confirmation order, and the U.S. Supreme Court denied Vision-Park's petition for writ of certiorari. Vision-Park Properties v. Seaside Engineering & Surveying, Inc., 2014 WL 1303707 (N.D. Fla. 2014), aff'd 780 F.3d 1070 (11th Cir. 2015), cert. den. 136 S.Ct. 109, 193 L.Ed. 2d 37 (2015). Following a status hearing and other procedural matters, the defendants refiled an amended joint motion for summary judgment. [Doc. 158.]

Facts

The Eleventh Circuit summarized the history of the related Chapter 11 case in its opinion affirming confirmation of Seaside's plan:

> Seaside is a civil engineering and surveying firm that conducts forms of technical mapping. Seaside provided services to, among other clients, the U.S. Army Corps of Engineers. Seaside's principal shareholders prior to all bankruptcy litigation were John Gustin, James Mainor, Ross Binkley, James Barton, and Timothy Spears. The principals branched out from their work as engineers and entered the real estate development business, forming Inlet Heights, LLC, and Costa Carina, LLC. These wholly separate entities borrowed money from Vision with personal guaranties from the principals. Inlet Heights and Costa Carnia defaulted on the loans, and Vision filed suit to recover amounts under the guaranties.
>
> Gustin filed for Chapter 7 bankruptcy protection for himself. Mainor and Binkley followed suit. All were appointed Chapter 7 trustees. Gustin, Mainor, and Binkley listed their Seaside stock as non-exempt personal property in their required filings. In April 2011, the Chapter 7 trustee in the Gustin case conducted an auction to sell Gustin's shares of Seaside stock. Gustin bid $95,500.00, and Vision defeated the bid with a purchase price of $100,000.00. Seaside attempted to block sale of Gustin's stock to Vision, but the bankruptcy court confirmed the sale. Following the sale of Gustin's stock, Seaside filed for Chapter 11 bankruptcy protection on October 7, 2011. [Footnote omitted.]
>
> Seaside proposed to reorganize and continue operations as the entity Gulf Atlantic, LLC ("Gulf"), an entity managed by Gustin, Mainor, Binkley, and Bowden, and owned by four members, the respective irrevocable family trust of each manager. The outside equity holders would receive promissory notes with interest accruing at a rate of 4.25% in exchange for their interest in Seaside and thus excluded from ownership in Gulf. The bankruptcy court approved the Second Amended Plan of Reorganization

> ("Second Amended Plan" or "Reorganization Plan"), over objection of Vision, valuing Seaside at $200,000.00. The district court affirmed the bankruptcy court.

In re Seaside Engineering & Survey, Inc., 780 F.3d 1070, 1074-5 (11th Cir. 2015), cert. den. 136 S.Ct. 109, 193 L.Ed. 2d 37 (2015).

Some additional facts relevant to Vision-Park's[2] suit are as follows. In August 2011, Seaside's board issued an additional 350 shares to Gustin as an essential employee to induce him to stay with the company, stating that the company could not continue without his participation because he was the "key designated personnel" for its U.S. Army Corps of Engineers projects and the only principal officer of the company registered as a licensed Florida surveyor. [Doc. 157-1, pp. 1-4.] The newly-issued shares contained a right of repurchase by Seaside and restrictions on transfer. However, pursuant to the amended plan and prior to calculation of the payout to shareholders, Seaside repurchased the 350 shares awarded to Gustin in August 2011. [Admin. doc. 380, p. 4.]

Seaside's confirmed second amended plan paid all creditors in full, extinguished all stock in Seaside, and paid all shareholders -- including plaintiff Vision-Park -- the value of their stock as determined by the bankruptcy court.[3] [Admin. doc. 339.] The confirmed plan also contained a release of claims against Seaside, Gulf, and their directors, officers and members. [Admin. doc. 339, p. 35.] However, the release contains an exception for "fraud, gross negligence or willful misconduct."

[2] Vision Bank purchased Gustin's shares in Seaside from his Chapter 7 trustee on April 20, 2011. Shortly thereafter, Vision Bank assigned the shares to Vision-Park. [Doc. 157, Order of Remand dated April 25, 2013, p. 4.]

[3] Vision-Park received approximately $98,500 as the largest creditor in the Gustin Chapter 7 case. [Admin. doc. 474, p. 7.]

Conclusions of Law

Under Federal Rule of Civil Procedure 56 (as incorporated by Bankruptcy Rule 7056), summary judgment must be entered if the evidence presented shows "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The moving party has the initial burden of proof to show that there are no genuine issues of material fact. Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1396 (11th Cir. 1994). The non-moving party must then show that an issue of fact exists. Id. The court must view the evidence in a light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). The defendants contend that they are entitled to summary judgment based on the res judicata (claim preclusion) and collateral estoppel (issue preclusion) effects of the bankruptcy court's confirmation order as well as several other grounds.

Although the plaintiff's Second Amended Complaint contains six counts, in summary it complains of four alleged "wrongful acts":

(1) the prepetition issuance of 350 shares of stock to John Gustin to induce Gustin to stay with Seaside, which Vision-Park complains diluted its interest as a shareholder (as noted above, Seaside repurchased the 350 shares as part of the confirmed plan); [4]

(2) the expenditure of Seaside's funds to challenge Vision-Park's purchases of shares of Seaside from Gustin's Chapter 7 trustee;[5]

[4] Doc. 67, ¶ 10.

[5] Id., ¶ 14-15.

(3) the decision to file the Seaside bankruptcy;[6] and

(4) the transfer of Seaside's assets and future profits through the confirmed plan of reorganization to Gulf, in which Vision-Park was not allowed to hold equity.[7]

Because the status of Vision-Park's claims as either derivative or direct is important to the treatment of the claim, the Court begins by categorizing each claim. Florida law governs whether a shareholder claim is derivative or direct. In re Bank United Financial Corp., 442 B.R. 49, 54 (Bankr. S.D. Fla. 2010). The Florida Third District Court of Appeal recently explained and summarized Florida law on classifying claims as direct or derivative in Dinuro Investments, LLC v. Camacho, 141 So.3d 731 (Fla. Dist. Ct. App. 2014). Acknowledging that "Florida doctrine explaining which actions should be maintained directly and which must be brought derivatively is incredibly opaque," the Dinuro court consolidated the case law into two categories with one exception. First, "an action may be brought directly only if (1) there is a direct harm to the shareholder or member such that the alleged injury does not flow subsequently from an initial harm to the company **and** (2) there is a special injury to the shareholder or member that is separate and distinct from those sustained by the other shareholders or members." Dinuro, 141 So.3d at 739-40 (emphasis in original). An exception to the two-prong inquiry applies when the shareholder or member can show that the defendant owes a separate duty to "the individual plaintiff under contractual or statutory mandates." Id. at 740 (citations omitted). The court must look to the complaint "to determine whether the injury is direct to the shareholder or to the corporation." Karten v. Woltin, 23 So.3d 839, 841 (Fla. Dist. Ct. App. 2015), citing Braun v. Buyers Choice Mortgage Corp., 851 So.2d 199, 203 (Fla. Dist. Ct. App. 2003).

[6] Id., ¶¶ 16, 17, & 23.

[7] Id., ¶¶ 20, 22, 32, 35, 38, 42, 44-45, 47-51.

Vision-Park's second amended complaint (doc. 67) unfortunately does not clearly specify which facts support the derivative claims and which the direct claims; Counts One, Two, and Three allege both types of claims together. The complaint's counts also do not contain specific factual allegations and simply incorporate by reference all the preceding factual allegations, making analysis of the claims difficult.

Count One is clearly a derivative claim brought by Vision-Park on behalf of Seaside. Paragraph 28 states that the defendants' actions of fraud, concealment, self-dealing and deliberate waste "resulted in damage to Seaside," and paragraph 29 says that the defendants violated their duty to act in good faith and in the best interests of Seaside. [Doc. 67, pp. 6-7.]

Count Two refers to an independent duty to Vision-Park as a minority shareholder in paragraph 31 and states that the defendants breached their duty to Seaside and independently to Vision-Park in paragraph 32. However, the damages complained of--use of Seaside's funds to oppose Vision-Park, transfer of Seaside's assets and future profits to Gulf, and use of Seaside's assets for defendants' own benefit -- are all damages allegedly suffered by Seaside, not Vision-Park directly. Count Two is thus also derivative in nature.

Count Three alleges breach of a duty of loyalty to both Seaside and Vision-Park. The duty of loyalty is a restatement of the claim for breach of fiduciary duty. The count includes no additional allegations of injury to Seaside or Vision-Park. The Court therefore finds that Count Three, like Count One and Count Two, is a derivative claim with no separate direct action claim by Vision-Park.

Count Four seeks a declaratory judgment that the defendants have no right to the assets and profits of Seaside. Plaintiff admits this count is moot in light of the affirmance of the confirmation order. [Doc. 163, p. 38.]

Count Five alleges that the individual defendants attempted "to squeeze out, wipe out, or freeze out Vision as a shareholder of Seaside and to eliminate the value of Vision's share of stock." [Doc. 67, ¶ 44.] The alleged damages sustained from these allegations would be separate and distinct to Vision-Park; therefore, this claim is direct.

Count Six asks the court "to order all assets transferred by the Individual Defendants be returned to Seaside, together with interest and attorney's fees and costs, and other such relief as the Court deems necessary, just and proper." Although the count is pleaded as direct and somewhat confusingly refers to attempted restrictions on transfer of the defendants' Seaside stock, the only relief sought -- "to order all assets transferred by the Individual Defendants be transferred to Seaside" -- is in favor of the corporation, Seaside. Count Six, to the extent it states a cause of action, seeks relief on behalf of Seaside and is thus derivative in nature.

In summary, the Court finds that Counts One, Two, Three, and Six are derivative in nature and that Count Five is a direct action by Vision-Park as claimed shareholder.

I. Summary judgment is due to be granted on the derivative claims because Vision-Park lacks standing to bring them.

Vision lacks standing to pursue derivative claims on behalf of the dissolved Seaside on three grounds.

First, the derivative claims became property of Seaside's Chapter 11 estate upon filing of the bankruptcy petition. Under bankruptcy law,

> a corporation's filing for bankruptcy cuts off a shareholder's ability to bring a derivative claim. The commencement of a bankruptcy case creates an estate for the benefit of creditors which encompasses "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1). The bankruptcy estate includes all legal claims owned by corporate debtor, including derivative actions brought by shareholders. Matter of Consolidated Bancshares, 785 F.2d 1249, 1253-54 (5th Cir. 1986); Mitchell Excavators, Inc. v. Mitchell, 734 F.2d 129, 131 (2nd Cir. 1984).

In re General Dev. Corp., 179 B.R. 335, 338 (S.D. Fla. 1995). "[W]hile normally the fiduciary obligation of officers, directors and shareholders 'is enforceable directly by the corporation or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee.'" Mitchell Excavators, 734 F.2d at 131, quoting Pepper v. Litton, 308 U.S. 295, 306-307 (1939). "The §541 estate, thus, includes any right of action of the debtor corporation may have to recover damages for misconduct, mismanagement, or neglect of duty by a corporate officer or director. The trustee in bankruptcy succeeds to that right. Its nature is derivative." General Dev., 179 B.R. at 338-39.

Vision-Park argues that some of the derivative claims arose postpetition, that is, after Seaside filed Chapter 11 in October 2011. However, Seaside's postpetition claims are still part of its bankruptcy estate pursuant to Bankruptcy Code § 541(a)(7). See In re Schepps Food Stores, Inc., 160 B.R. 792, 798-99 (Bankr. S.D. Tex. 1995) (shareholders' derivative claims based on management's misdeeds occurring between the petition and confirmation were property of the estate under 11 U.S.C. § 541(a)(7)).

A shareholder can bring a derivative action after a bankruptcy petition has been filed only if the trustee or debtor-in-possession has abandoned the claim voluntarily or by court order. Id. at 339, citing Mitchell Excavators, 734 F.2d at 131-132. "Constructive" abandonment by failing to prosecute a claim is not possible because a debtor must follow the notice and hearing requirements of Bankruptcy Code §554(a) and Bankruptcy Rule 6007(a) and obtain court permission before abandoning a claim. General Dev., 179 B.R. at 339 (citations omitted).

There is no allegation in the complaint or evidence cited by Vision-Park that Seaside voluntarily abandoned any potential claims against the defendants or that the bankruptcy court ordered Seaside as debtor-in-possession to abandon any claims against the defendants. As a

result, any derivative claim for Seaside against its directors thus became property of the bankruptcy estate once the company filed its Chapter 11 petition in October 2011.

Second, Vision-Park lacks standing because the derivative claims on behalf of Seaside now belong to the reorganized Gulf pursuant to the terms of the confirmed Chapter 11 plan. The plan provided:

> G. Revesting of Property in the Reorganized Debtor
>
> Except as otherwise expressly provided herein or in the Confirmation Order, on the Effective Date, but retroactive to the Confirmation Date, without any further action, the Reorganized Debtor will be vested with all of the property of the Debtor's estate, wherever situated, free and clear of all Claims, Liens and Interests, and may use, acquire or dispose of its assets free of any restrictions imposed by the Bankruptcy Code or by the Bankruptcy Court. Except as otherwise expressly provided herein or in the Confirmation Order, other Rights of Action will be preserved and retained solely for the Reorganized Debtor's commencement, prosecution, use and benefit.

[Admin. doc. 339, pp. 36-37 (emphasis added).] Section IX.E of the confirmed plan as amended also provided in part: "As of the Effective Date, any and all Avoidance Actions occurring to the Debtor and/or Debtor in Possession are reserved and the Reorganized Debtor shall have the right to commence any avoidance actions…." [Id., p. 35.] "Avoidance actions" are defined in the plan as "each and every claim, demand or cause of action whatsoever which the Debtor has or had the power to assert immediately prior to the Confirmation of the Amended Plan, including, without limitation, actions for avoidance and recovery, pursuant to Bankruptcy Code § 550, of transfers avoidable by reason of Bankruptcy Code §§ 544, 545, 547, 548, 549, or 553(b)." [Id., pp. 3-4.] Under Bankruptcy Code § 544, a trustee or debtor-in-possession has the power to pursue state law fraudulent transfer claims such as those alleged in Count Six.

The bankruptcy court confirmed the second amended plan, and the district court and Eleventh Circuit affirmed confirmation on appeal. The confirmed plan was binding upon plaintiff as a shareholder of the debtor, as discussed below. Thus all claims which Seaside held

immediately prior to confirmation, including but not limited to fraudulent transfer claims, are now vested in the reorganized debtor Gulf.

Finally, Vision-Park also lacks standing to bring a derivative action under the "continuous ownership" requirement. Seaside's confirmed plan cancelled all equity ownership in the debtor, including Vision-Park's. [Admin. doc. 339, pp. 23-24.] "Under both federal and Florida law, a plaintiff bringing a shareholder derivative suit must be a shareholder when the action was brought and throughout the course of the litigation. Schilling v. Belcher, 582 F.2d 995, 999-1000 (5th Cir. 1978); Timko v. Triarsi, 898 So.2d 89, 91 (Fla. Dist. Ct. App. 2005) (finding that the plaintiff in a shareholder derivative suit 'must meet the common law requirement of continuous ownership throughout the pendency of the suit')." Hantz v. Belyew, 194 Fed. Appx. 897, 989 (11th Cir. 2006). In Hantz, the court dismissed the plaintiff's derivative claim because the shareholder-plaintiff's shares were extinguished in the corporate debtor's Chapter 11 reorganization. More recently, the district court in Siegmund v. Bian, 2016 WL 1444582 (S.D. Fla. 2016) relied on Hantz to grant the defendant's motion to dismiss a derivative suit by a shareholder who owned stock when the action was filed but lost the stock in a merger that occurred while the action was pending. After examining the holdings in Hantz, Schilling, and Timko, the court found that the plaintiff failed to satisfy the continuous ownership rule because he no longer owned stock in the corporation.

Vision-Park contends that Hantz is distinguishable because the Hantz plaintiff filed the derivative suit after his shares were terminated in the Chapter 11 proceeding and because he failed to contest the plan that ultimately extinguished his shares. Vision-Park asserts that it has diligently pursued its claims by filing suit before the bankruptcy court confirmed Seaside's plan that terminated its shares and by vigorously objecting to the plan. The district court in Hantz

cited the plaintiff's opportunity to litigate these issues in the bankruptcy court as a reason for rejecting the plaintiff's argument that there should be an exception to the continuing ownership argument for an involuntary loss of stock, noting "Plaintiffs have already had an adversarial forum in which they could challenge [the debtor's] reorganization plan--the bankruptcy proceedings." Hantz v. Belyew, 2006 WL 740408, *3 (N.D. Ga. 2006). Vision-Park had the same opportunity to challenge the plan in Seaside's confirmation proceeding, and therefore, cannot claim to be disadvantaged by application of the "continuous ownership" requirement.

Vision-Park also argues that, while Florida Statute §607.07401 requires a plaintiff to be a shareholder at the time a derivative action is filed and at the time that the transaction complained of occurred, it does not mention continuing status as a shareholder. However, the district court in Siegmund considered the Timko decision and found a Florida common law requirement for continuous stock ownership throughout the derivative case. "A plaintiff in a derivative suit, in addition to meeting the requirements of [Florida Statute §607.07401], must meet the common law requirement of continuous ownership throughout the pendency of the case." Siegmund, at *5, quoting Timko, 898 So.2d at 91.

The confirmation order in Seaside's Chapter 11 case cancelled all equity in the debtor; as a result, Vision-Park currently has no stock ownership in Seaside. Under Florida law, Vision-Park thus lacks standing to bring the derivative claims on behalf of Seaside.

II. The derivative claims also fail because the plaintiff failed to make a demand on directors for the relief sought in the complaint.

The plaintiff in a federal derivative suit must comply with the procedural demand requirement of Federal Rule of Civil Procedure 23.1 (applicable in bankruptcy adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7023.1) and with the substantive demand requirements of state law. See Kamen v. Kemper Fin. Services, Inc., 500 U.S. 90, 95-96

(1991) (addressing demand futility and clarifying that federal courts should apply state substantive law). The law of the state of incorporation governs the extent of any demand requirement in a derivative action. Stepak v. Addison, 20 F.3d 398, 402 (11th Cir. 1994). Seaside was incorporated under the laws of the state of Florida. [Doc. 67, p. 2.]

Federal Rule of Civil Procedure 23.1(b) requires that a derivative complaint must be verified and that the plaintiff, among other things, must "state with particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and (B) the reasons for not obtaining the action or making the effort." The plaintiff's original complaint here was verified, but the first and second amended complaints were not. [Docs. 1, 66, and 67.] Although the original and amended complaints all allege that "[plaintiff] has endeavored to stop the Defendants from damaging Seaside," and that "any additional efforts to stop the Defendants would no doubt meet with the same lack of success," none of them alleges with particularity a demand on Seaside's directors or the reasons for not doing so. [Doc. 1, ¶ 24; doc. 66, ¶ 25; doc. 67, ¶ 25.]

Florida law, which governs the substantive demand requirement, requires a shareholder to allege with particularity that he has made a demand on the corporation's board of directors before bringing a derivative suit on behalf of the corporation:

> (2) A complaint in a proceeding brought in the right of a corporation must be verified and allege with particularity the demand made to obtain action by the board of directors and that the demand was refused or ignored by the board of directors for a period of at least 90 days from the first demand unless, prior to the expiration of the 90 days, the person was notified in writing that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. If the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed.

Fla. Stat. § 607.07401(2) (2003). Thus, shareholders are prohibited from bringing a derivative suit until 90 days have passed since the demand unless the corporation rejects the demand or waiting the full 90 day period will cause irreparable harm to the corporation. Id. If the corporation institutes an investigation into the demand, the court may stay the proceeding pending the outcome of investigation. Id. A derivative suit may be dismissed if a disinterested and independent majority of the board, a committee thereof or other appointed individuals determine in good faith and after reasonable investigation that maintenance of the suit is not in the best interests of the corporation. Fla. Stat. § 607.07401(3) (2003).

Some states, as have some Florida courts based on an earlier version of its law, provide a "futility" exception to the demand requirement for derivative suits. See e.g., Belcher v. Schilling, 309 So. 2d 32 (Fla. Dist. Ct. App. 1975). However, the plain language of Florida's demand law as enacted in 1990 and 2003 clearly does not contain a futility exception to the demand requirement. See Noah Technologies, Inc. v. Rice, 2014 WL 6473664 (M.D. Fla. 2014); D'Addario v. Geller, 2005 WL 1667913 (E.D. Va. 2005) (applying Florida's mandatory demand requirement but finding it waived); Garcia v. Deyesso, 30 Mass. L. Rptr. 527 (Mass. Sup. Ct. 2012) (applying Florida law). For an excellent discussion and history of Florida's demand requirement in shareholder derivative cases, see Etan Mark & Steven D. Weber, Resistance Is Futile: The Myth of Demand Futility, 88 Fla. B.J. no. 5, May 2014, at 10.

Plaintiff's original and two amended complaints do not allege with particularity that it made a demand on Seaside's directors for the relief complained of in the complaint or the reasons for not doing so. The derivative claims are thus barred by both Federal Rule of Civil Procedure 23.1 and Florida Statute § 607.07401(2).

III. The issue preclusion effect of the confirmation order bars the direct action claims in the complaint.

The doctrine of issue preclusion, also known as collateral estoppel, bars a party from re-litigating an issue of law or fact that has been litigated and tried in a previous action. To invoke issue preclusion, a party must show: (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. CSX Transportation, Inc. v. Brotherhood of Maintenance of Way Employees, 327 F.3d 1309, 1317 (11th Cir. 2003).

Vision-Park's direct claims in Count Five can be summarized as (1) minority shareholder squeeze-out and (2) diminution in the value of its shares in Seaside. [Doc. 67, ¶ 44.]

The first issue is whether issue preclusion bars the minority shareholder squeeze-out claim. Unlike the usual minority shareholder squeeze-out situation, one of the stated goals of Seaside's reorganization was the removal of Vision-Park as a shareholder. Defendant Gustin, whose shares Vision bought from his Chapter 7 trustee, was Seaside's key employee for the specialized hydrographic surveying and navigational mapping it performed for the Army Corps of Engineers -- which was 90% of its business. Vision-Park Properties v. Seaside, 2014 WL 1303707 at *3. More importantly, if Vision acquired a majority interest in Seaside, it would destroy Seaside's opportunity to obtain contracts that are set aside for small businesses. Seaside, 780 F.3d at 1082.

Vision-Park vehemently objected to its removal as a shareholder by the plan and to the transfer of Seaside's assets to the reorganized Gulf. Vision-Park argued in opposition to the

plan: "Seaside used every means at its disposal to attempt to divest Vision-Park of its interest in the Gustin Stock, and to prevent the Chapter 7 Trustees in the Mainor and Binkley bankruptcy cases from selling those debtors' shares for the benefit of Mr. Mainor's and Mr. Binkley's creditors. All of these efforts were pursued using Seaside's corporate resources, thereby harming the interests of Vision-Park and the creditors of the other shareholders by diminishing the value of the Debtor's stock." [Admin. doc. 214 at p. 8.]

In its oral ruling confirming Seaside's second amended plan, the bankruptcy court addressed Vision-Park's objections: "According to Vision, all of this is part of a plan to divest the nonfavored shareholders of their equity interest in the debtor, while, at the same time, transferring and enhancing the interest of the favored shareholders by transferring all assets, liabilities and potential future profits to Gulf Atlantic. This would allow the principal shareholders to continue their control of the debtor." [Admin. doc. 474, p. 20.]

Having considered these grounds for Vision's objections, the bankruptcy court approved the amended plan:

> To paraphrase, the objectives of the bankruptcy code enunciated in the United Marine case cited above, they are as cited: one, preserve jobs in the community; two, to allow a business to continue to operate rather than be liquidated; and, three, achieve consensual resolution of the company's debt with its creditors. United Marine, 197 [B.R.] at 947.
>
> This plan, contrary to the objection of Vision and the trustees [for Mainor and Binkley], achieves the results consistent with the Bankruptcy Code. While Vision maintains that formation of Gulf Atlantic, LLC and the various family irrevocable trusts shows bad faith, the evidence in the case shows that the debtor, following legal advice, was attempting to preplan an exit strategy which might or might not be successful. It does not indicate a nefarious bad faith, particularly when taken in the context of the Second Amended Plan, and the fact that all creditors have accepted the plan and interest holders will be paid their pro rata share.
>
> The evidence shows that the debtor's line of credit was cut off, that there appeared to be a very real possibility that Vision could acquire and had the ability

> to acquire the shares of Mainor and Binkley from the Chapter 7 trustees, which would be detrimental to the debtor with respect to its government contracts with the Corps of Engineers and its status as a small business.
>
> This risk would seem to be a valid reason for attempting to carefully plan possible solutions which would include a Chapter 11 plan of reorganization, which would ultimately pay not only the creditors but the interest holders the proportionate value of their interest the debtor has set forth in their second amended version of the plan.
>
> If successful, the plan would preserve the jobs, maintain the debtor as a going concern, pay the creditors and also pay the interest holders the value of their interests over time. Therefore, the Court determines that such a plan meets the good faith test under Section 1129(a)(3).

[Admin. doc. 474, pp. 24-25 (emphasis added).]

On appeal, the district court affirmed confirmation of a plan which paid Vision-Park in full for its stock in Seaside but did not provide that it receive an interest in the reorganized debtor Gulf:

> The record supports the Bankruptcy Court's finding of good faith in other respects. The Plan provides for payment in full to all creditors. In contrast, Mr. Gustin testified that if the case were converted to a Chapter 7 case then the creditors would receive 23 cents on the dollar. ECF No. 17, Docket 477, p. 65. All creditors voted in favor of the Plan. ECF No. 17, Docket 477, p. 36. Mr. Gustin testified that the reorganized debtor intended on continuing to employ all 23 workers currently with Debtor. ECF No. 17, Docket 477, p. 37. Mr. Gustin testified that Debtor is designated as a small business, and therefore is eligible for contracts that are set aside for only small businesses. ECF No. 17, Docket 477, p. 102. Debtor's counsel noted that if Vision acquired a majority interest then it would destroy Debtor's opportunity to compete for the set-aside contracts. ECF No. 17, Docket 477, p. 134. For the reasons set forth above, this Court concludes that the Bankruptcy Court's finding of good faith was not clear error.
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> . . . .
>
> Vision argues that the Plan unfairly discriminates against the disfavored equity holders, including Vision, by leaving them holding the unsecured equity promissory notes for their shares of Debtor while on the other hand Debtor's favored insiders receive the same promissory notes for their share of Debtor but also receive shares in the new company. Debtor responds by arguing that since all equity holders are being equally extinguished and being equally paid 100% of the value of their interests, there simply is no discrimination regarding treatment

> of equity holders under the Plan, regardless of whether the ownership in the new company were to consist of a subset of old equity--which, incidentally, is not the case here as the "new equity" is held by trusts, the beneficiaries of which are not the original shareholders. This Court concludes that the Plan does not unfairly discriminate.

Vision-Park Properties, 2014 WL 1303707, *14, 15 (emphasis added).

Vision-Park then appealed the district court's decision to the Eleventh Circuit Court of Appeals. In affirming the district court's and the bankruptcy court's rulings confirming the plan, the Eleventh Circuit noted: "The plan to remove Vision from control is not just some nefarious plot. Moreover, the record indicates that key employees of the business would not continue to serve -- the very life blood of the business -- if Vision had a substantial role in the reorganized entity." In re Seaside Engineering & Surveying, Inc. 780 F.3d 1070, 1082 (11th Cir. 2015). The Eleventh Circuit also held that the plan did not unfairly discriminate against Vision-Park by failing to give it stock in the reorganized Gulf -- the very "squeeze-out" for which Vision-Park is suing now:

> The bankruptcy court held that Vision received full value for its stock interest, and therefore §1129(b)(2)(C)(i) was satisfied, and thus there was no unfair discrimination. Thus, the bankruptcy court concluded there was no unfair discrimination. Especially in the unusual circumstances of the instant case, we agree. Our research has uncovered no cases in which an objecting holder of an equity interest--who has been paid in full for the value of his interest-- could prohibit a successful reorganization by insisting on becoming a stockholder in the reorganized entity. In none of the cases cited by Vision was an objecting equity holder paid the full value of its equity interest under the provisions of the Reorganized Plan.

780 F.3d at 1083 (emphasis in original).

Vision-Park also contends in Count Five that the defendants attempted to "eliminate" the value of its stock in Seaside. [Doc. 67, ¶ 44.] Vision-Park has a direct claim for stock devaluation only to the extent that its stock lost value because of circumstances unique to Vision-Park, since a shareholder's claim for stock devaluation that was shared by all shareholders is a

derivative claim which must be brought on behalf of the corporation. See Kloha v. Duda, 246 F.Supp. 1237, 1242-43 (M.D. Fla. 2003), Hill v. Brady, 737 So. 2d 1243 (Fla. Dist. Ct. App. 1999).

However, in the Chapter 11 case Vision-Park's stock was judicially valued on the same basis as that of all other shareholders' stock and it has been paid that value pursuant to the confirmed plan. The bankruptcy court conducted a two-day evidentiary hearing on valuation and then a second hearing for all other confirmation issues. [Admin. doc. 474, p. 11.] The bankruptcy court determined Seaside's value to be $200,000 and denied confirmation of the original plan with leave to file an amended plan. [Id., p. 12.] In later confirming Seaside's amended plan, the bankruptcy court noted "[w]hile Vision has respectfully disagreed with the Court's prior decision placing a $200,000 valuation of the debtor as a going concern, the Court is not inclined to reassess its prior ruling." [Id., p. 27-28.] The bankruptcy court also considered Vision-Park's objection that its equity would be extinguished and replaced with a note from Gulf Atlantic, finding that the debtor's plan met the fair and equitable requirements of 11 U.S.C. §1129(b)(2)(C)(i). [Id., pp. 28-31.]

Vision-Park raised Seaside's valuation as a primary issue on appeal to the district court, identifying four ways the valuation was flawed. Vision-Park Properties, 2014 WL 1303707 at *1. The district court spent much of its opinion addressing these issues and concluded that the bankruptcy court did not err in its valuation of Seaside on any of the four issues. Id. at *2-*11. On further appeal, the Eleventh Circuit again held that the bankruptcy court used the proper valuation method in its decision and had committed no error in valuing Seaside. Seaside, 780 F.3d at 1075-76. As discussed above, the Eleventh Circuit also found that Vision-Park had been

paid in full for its interest and did not have the legal right to become a shareholder in the reorganized debtor. Id. at 1083.

The four elements of issue preclusion are met here with regard to both of Vision-Park's direct claims. Three different courts have ruled on the merits (1) that not allowing Vision-Park to become a shareholder in the recognized debtor was legal, permissible under the Bankruptcy Code, and pursued in good faith and (2) that Seaside was valued correctly and Vision-Park has been paid in full, on the same basis as other shareholders, for the value of its interest in Seaside. Those are the same issues now involved in Vision-Park's direct claims. These issues were actually litigated during the confirmation process and were a critical part of the judgment. Vision-Park had a full and fair opportunity (of which it has availed itself) to litigate the issues before the bankruptcy court and three appellate courts. The direct claims are thus barred by issue preclusion.

IV. Count Six is also barred by claim preclusion since the transfers which Vision-Park seeks to set aside were made pursuant to a court order which is now final.

The doctrine of claim preclusion, also called res judicata, bars subsequent litigation on a cause of action if there has been a prior judgment on the same cause of action. Claim preclusion has four requirements: (1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action. In re Justice Oaks II, Ltd., 898 F.2d 1544, 1550 (11th Cir. 1990). Claim preclusion "extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same set of facts." Olmstead v. Amoco Oil Co., 725 F.2d 627, 632 (11th Cir. 1984).

The bankruptcy court was a court of competent jurisdiction to enter the confirmation order in Seaside's chapter 11 case and the confirmation order was a final judgment on the merits after all appeals were complete. Justice Oaks, 898 F.2d at 1550. Count Six's derivative claim demanding that assets be transferred back to Seaside also arises from the same set of operative facts as Vision-Park's objections to Seaside's plan and amended plan, which have been confirmed by an order which is now final.

Seaside's Chapter 11 case and the present adversary proceeding also involve the same parties or their privies. Parties "for purposes of former adjudication, include 'all who are directly interested in the subject matter and who have a right to make defense, control the proceedings, examine and cross-examine witnesses and appeal from judgment if an appeal lies.' [Citation omitted.] Thus, one who participates in a chapter 11 plan confirmation proceeding becomes a party to that proceeding even if never formally named as such." Justice Oaks, 898 F.2d at 1550-51. Vision-Park, Seaside, Gulf Atlantic and the individual defendants were all parties to Seaside's confirmation proceedings. Furthermore, a non-party can be in privity with a party if the non-party assumed control over the litigation in which the judgment was entered. Taylor v. Sturgell, 553 U.S. 880, 128 S.Ct. 2161, 2172, 171 L.Ed.2d 155 (2008); Griswold v. County of Hillsborough, 598 F.3d 1289, 1292-93 (11th Cir. 2010) (sole shareholder and president of company bound by prior judgment against the company because he assumed control of the litigation in which the prior judgment was rendered). As officers and directors of Seaside, the individual defendants directed Seaside's actions during the confirmation process and participated in the confirmation hearings; in fact, their doing so is the basis of Vision-Park's suit.

The claims and legal theories in Count Six--that the transfer of Seaside's assets to the reorganized Gulf, an entity owned by irrevocable family trusts, constituted a fraudulent transfer--

are the same underlying as Vision-Park's objections to Seaside's plan. As discussed at length above, Vision-Park vigorously objected to Seaside's plan and amended plan on the basis that the individual defendants were using Seaside's Chapter 11 case as a scheme to fraudulently convey Seaside's assets to Gulf and to convey their own interests in Seaside to the family trusts. Vision-Park argued that "Seaside [was] attempting to use this Chapter 11 proceeding to engineer a fraudulent conveyance and/or fraudulent conveyance of those assets from their non-exempt status in the former shareholders' personal bankruptcies to exempt assets held by their newly-created Shareholder Trusts." [Admin. doc. 214 at p. 11.] Vision further complained that the amended plan was "nothing more than a vehicle to complete a classic fraudulent transfer which would violate the provisions of the Code and applicable state law." [Admin. doc. 376 at p. 10]. The bankruptcy court rejected these arguments in the now-final confirmation order: "While the fraudulent transfer objection was an interesting theory, Vision did not offer any case law to support said objection." [Admin. doc. 474, p. 20-21.]

All the elements required for claim preclusion are met, and Count Six is thus barred by claim preclusion.

V. Summary judgment is appropriate at this stage of the case without further discovery.

Plaintiff's counsel has filed a declaration (doc. 162) under Federal Rule of Civil Procedure 56(d) and an amended declaration (doc. 170) correcting some errors in the original. Defendants have filed motions to strike both (docs. 168 and 173). By separate order, the Court will grant the motion to strike the original declaration, since it has been superseded by the amended version, but deny the second motion to strike in the interest of ensuring a complete record. However, the alleged fact issues on which plaintiff wants more discovery--the applicability of the plan's exculpatory clause, whether a pre-suit demand would have been futile,

and the existence of recoverable damage--do not relate to the legal issues on which summary judgment is recommended and should not preclude the entry of summary judgment at this stage. [Doc. 170, ¶¶ 49-51.]

Conclusion

To summarize, the Court finds that no genuine issues of material fact exist and the defendants are entitled to a judgment as a matter of law as to both the derivative claims and direct claims in the second amended complaint. It is hereby RECOMMENDED that the district court grant the defendants' amended joint motion for summary judgment.

Dated: October 6, 2016

HENRY A. CALLAWAY
U.S. BANKRUPTCY JUDGE