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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

HARRIET B. **DANN** [FN1] *vs.* JAMES T. PATTEN & another. [FN2]

07-P-1031

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff and defendants are board certified ophthalmologists and equal shareholders in a closely held professional corporation, Eye Care Specialists, P.C. (ECS). The plaintiff filed direct and derivative claims against the defendants, claiming (1) breach of fiduciary duty; (2) breach of contract; and (3) unfair and deceptive business practices in violation of G. L. c. 93A, §§ 2, 11. The plaintiff now appeals summary judgment granted in favor of the defendants. We affirm.

Discussion. Summary judgment is appropriate when there is no genuine issue of material fact and, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as matter of law. See Mass.R.Civ.P. 56(c), as amended, 436 Mass. 1404 (2002); *Gray v. Giroux,* 49 Mass. App. Ct. 436, 438 (2000). 'The moving party may prevail by showing that the nonmoving party has no reasonable expectation of proving an essential element of the case at trial.' *Jupin v. Kask,* 447 Mass. 141, 146 (2006), citing *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 710 (1991). Our review of an appeal from summary judgment is de novo. *Ritter v. Massachusetts Cas. Ins. Co.,* 439 Mass. 214, 215 (2003).

Breach of fiduciary duty. Shareholders in a close corporation owe each other a fiduciary duty of the 'utmost good faith and loyalty.' *O'Brien v. Pearson,* 449 Mass. 377, 383 (2007), quoting from *Donahue v. Rodd Electrotype Co. of New England, Inc.,* 367 Mass. 578, 593 (1975), and 'may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation.' *Donahue v. Rodd Electrotype Co. of New England, Inc., supra.*

The plaintiff contends that the defendants' attempt to transfer Patten's corporate stock to Frangieh violated their fiduciary duty and the corporate by-laws, specifically art. VII, § 6(b). The dispositive word is 'attempt.' While on July 7, 2005, Patten sent an electronic mail message (e-mail) to the plaintiff indicating that Frangieh had offered to purchase his shares, Patten stated that any sale was in 'the early stages and need[ed] work.' The record is clear that no agreement was executed. The plaintiff has failed to establish that the defendants breached their fiduciary duty by simply discussing an agreement that never materialized. See *Hanover Ins. Co.* v. *Sutton,* 46 Mass. App. Ct. 153, 164 (1999) (essential elements of breach of fiduciary duty claim are existence of fiduciary duty, breach, damage, and causation).

Similarly, the plaintiff's claim that the defendants violated § 6(b) of the corporate by-laws also

fails. [FN3] Nothing in the corporate by-laws, generally, or § 6(b), in particular, prohibits shareholder discussions. There was simply no specific agreement between the defendants that would be subject to the requirements of this provision. In fact, in a February 15, 2006, letter to the plaintiff, Patten indicated his intention to withdraw from the corporation and redeem his shares in accordance with his stock redemption agreement, rather than sell them to either Frangieh or the plaintiff. [FN4] For these reasons, the judge properly granted summary judgment in favor of the defendants on this claim.

Breach of contract. The plaintiff argues that Patten breached a contract formed when he agreed to transfer the corporate office lease over to the corporation in exchange for receiving additional clinic hours. [FN5] The defendants contend, and the judge noted, that this claim is barred due to the plaintiff's failure to comply with the notice pleading requirements. We agree.

'Under the Massachusetts practice of notice pleading, 'there is no requirement that a complaint state the correct substantive theory of the case." *Berish v. Bornstein,* 437 Mass. 252, 269 (2002), quoting from *Gallant v. Worcester,* 383 Mass. 707, 709 (1981). However, a complaint must contain 'a short and plain statement of the claim,' Mass.R.Civ.P. 8(a)(1), 365 Mass. 749 (1974), 'which affords fair notice to the defendant of the basis and nature of the action against him.' *Berish v. Bornstein, supra.*

Nothing in paragraph 17 of the complaint, or, for that matter, elsewhere in the pleadings adequately provides the defendants with notice of the plaintiff's contention that a contract, implied-in-fact or otherwise, arose from the conduct of the parties. [FN6] As a result of this noncompliance, the claim fails and further discussion is unnecessary.

The plaintiff also contends that Patten breached both his fiduciary duty and the corporate by-laws by refusing to refer patients to her. There is nothing in the record which indicates that Patten is under a contractual duty to make an equal amount of referrals to the plaintiff. Additionally, the plaintiff failed to explain how Patten's fiduciary duties obligate him to make such referrals. For these reasons, the judge properly granted summary judgment on this claim.

Separate claim against Frangieh. The plaintiff argues that Frangieh violated both his fiduciary duty to her and his employment agreement by conducting LASIK surgery. The plaintiff contends that these specific claims were not addressed by the judge because the motion for summary judgment filed by Patten, which Frangieh was allowed to join, only addressed claims common to both of them. [FN7]

As our review is de novo, we can support the judgment on grounds not relied upon by the trial judge. *Beal v. Selectmen of Hingham,* 419 Mass. 535, 539 (1995). After a review of the record, it is clear that the plaintiff has no reasonable expectation of proving the essential elements of these claims at trial. *Jupin v. Kask,* 447 Mass. at 146. There is no evidence in the record that the LASIK surgery practice is damaging to either the plaintiff, specifically, or the corporation, generally. See *Billings v. GTFM, LLC,* 449 Mass. 281, 288 (2007) (damage is essential element of breach of fiduciary duty claim). Additionally, it is clear from the record that Frangieh asked for and received the plaintiff's approval to conduct LASIK surgery at the time he joined the corporation. Overall, we conclude that summary judgment in favor of defendant Frangieh is warranted.

Chapter 93A claims. The judge correctly noted that since all other claims fail, the plaintiff's c. 93A claim also fails and, nevertheless, disputes between shareholders in a closely held corporation are outside the scope of c. 93A. See, e.g., *First Enterprises, Ltd.* v. *Cooper,* 425 Mass. 344, 347 (1997). [FN8]

Judgment affirmed.

By the Court (Perretta, Mills & Rubin, JJ.),

Entered: November 17, 2008.

FN1. Individually and on behalf of Eye Care Specialists, P.C.

FN2. George T. Frangieh.

FN3. Section 6(b)(i) requires, in part, that an offering shareholder inform the corporation of any proposed sale or transfer of stock at least thirty days prior to the transaction and that the shareholder submit a written notice identifying, among other things, the number of shares to be transferred, the price or other consideration to be paid per share, the name(s) of the transferee(s), and other terms of the transaction.

FN4. The plaintiff also claims that the defendants breached their fiduciary duty by planning to leave '[her and ECS] owning a lot of furniture, fixtures and equipment (FF & E) that they would have to move, because they couldn't lease the office.' (Appellant brief, pp. 22-23). This is an inaccurate representation of a January 25, 2006, e-mail between the defendants' attorneys. The record reflects that the attorneys were discussing the ramifications of Patten's withdrawal from the corporation on *both* the plaintiff and Frangieh and not a plan to retaliate against the plaintiff.

FN5. Patten and his wife lease office space which ECS occupies as a tenant-at-will, paying Patten and his wife a monthly rent. The office space is located in a building owned by a limited partnership, in which Patten and his wife are limited partners.

FN6. Paragraph 17 in the plaintiff's complaint reads:

'17. More recently, Dr. Patten has pursued a variation on the schemes set out in paragraphs 15 and 16 by attempting to leverage his ownership of ECS' offices. Dr. Patten is attempting to void or interfere with ECS' long term lease by conveying or leasing the property to Dr. Frangieh in return for the same unlawful employment and patient referral kickback arrangement referred to above. In this willful action, Dr. Patten and Dr. Frangieh are attempting to harm ECS and further damage Dr. Dann's practice, professional interests, practice, and shareholder rights -- all in violation of the Defendants' fiduciary and corporate obligations, in violation of ECS' leasehold rights, and in violation of the bylaws and the parties' stock redemption and employment agreements.'

FN7. We note that Frangieh argues that the plaintiff failed to comply with Mass.R.Civ.P. 10(b), as amended 371 Mass. 909 (1977), by not stating '[e]ach claim founded upon a separate transaction . . . in a separate count or defense.' We agree that the plaintiff did not present this individual claim against Frangieh in a manner which 'facilitates the clear presentation of the matters set forth.' Mass.R.Civ.P. 10(b).

FN8. The plaintiff's derivative claims also fail for the reasons outlined above.

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