

Mass. Corporation Act applies retroactively

By David E. Frank

A plaintiff shareholder involved in the dissolution of a hair salon was entitled to dismissal of a counterclaim where the defendant, who was the only other shareholder in the company, failed to properly make a written demand, a Superior Court judge has ruled.

The defendant argued that his counterclaim was exempt under the 2004 Massachusetts Corporation Act, which was enacted three years after the filing of the lawsuit, since the demand requirements had been waived and the original claim provided the plaintiff with ample notice.

But Judge Thomas P. Billings disagreed, holding that the statute, G.L.c. 156D, §7.42, should be applied retroactively, particularly where the defendant had amended his counterclaim in 2005 to add a derivative claim.

“Here, there is no reason why [the defendant] could not have satisfied the demand requirement prior to adding the derivative count to his counterclaim, and thus no reason why the statute should not be taken at its word, on and after its effective date,” he wrote. “Nor does the statute make exception for a counterclaim.”

The nine-page decision is *Blake, et*



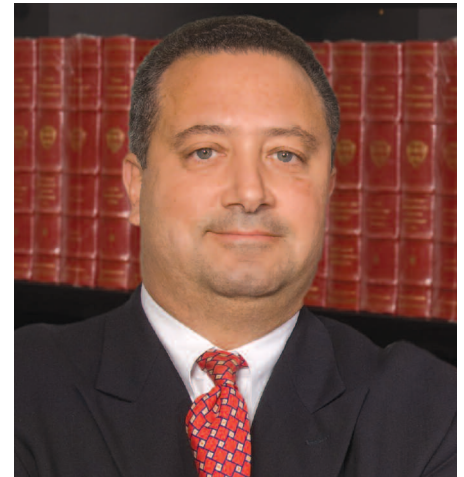
MARK E. BURKE

al. v. Kennedy, et al. v. Curio Salon, LLC, et al., Lawyers Weekly No. 12-326-08.

Clear warning

Edward F. Foye, of Boston's Todd & Weld, represented the plaintiff along with Burlington lawyers Nicholas J. Di Mauro and Mark E. Burke. Foye said this was the first state court decision to address the statute's notice requirement.

“The message to be taken here is that any shareholder who intends to assert derivative claims by way of a counterclaim has to give notice to the corporation,” he said. “The judge held that it makes no difference whether the cause of action accrued before [passage of] the statute or after.”



NICHOLAS J. DI MAURO

With the lack of state court precedent, Foye said he relied, in part, on a 2005 decision by U.S. District Court Judge Joseph L. Tauro, which held that the language of the 2004 statute entitled corporations to notice prior to the filing of a derivative claim.

“What Judge Tauro and now Judge Billings determined is that the statute trumps the policy of free amendment pleadings,” he said. “It isn't enough simply to suggest that there might be derivative claims out there in a pleading that was filed prior to the effective date of the statute.”

While not binding, Foye, who said he has already been served with a motion to reconsider, said the decision should serve as a clear warning to corporate lawyers.

“If you’re a shareholder who gets sued by a corporation, and you think you have a derivative counterclaim, you can’t assert that counterclaim without giving notice to the corporation,” he said. “You have to give it the opportunity to make use of its statutory rights and remedies.”

Wakefield attorney John Connolly Jr., who represented the defendant, declined to comment.

Bad hair day

In 2001, a dispute arose between the shareholders of a close corporation that owned and operated a hair salon in Reading.

The plaintiff, Christopher Blake, filed suit seeking various forms of relief against defendant Russell Kennedy. The original complaint named Curio Salon as both a plaintiff and defendant.

Kennedy then counterclaimed, asserting a number of theories including conversion.

Four years into the case, Kennedy filed an amended counterclaim against Blake, which, for the first time, purported to assert a shareholder’s derivative claim on behalf of the salon. He also filed a third-party complaint against the salon.

After a series of delays, the case was tried jury-waived in June in front of Billings.

A month earlier, a different judge entered a bifurcation order limiting the trial “to the issue of whether Kennedy had, on or before Dec. 2001, been frozen out of the [salon].”

Although Billings found that he had not, he said the question of whether either party was entitled to relief remained open.

The plaintiff then filed a motion to dismiss the counterclaim, arguing that since the addition of the derivative count was not preceded by a demand on the corporation’s directors, it could not be asserted under the statute.

No excuses

Even though the corporation consisted of only two shareholders, Billings said the statute clearly required the defendant to make a demand.

He added that when the Legislature has opted on other occasions to exempt a counterclaim from a demand requirement, it has done so expressly.

“I note in passing, that if ever there were a demand-excused case, it would be this one,” he wrote in a footnote. “Nonetheless [the statute] means what it says — no excuses, and thus no need to

navigate the slippery slope formerly in place.”

Billings said that other judges, including Tauro, had similarly found the demand requirement was triggered whenever a shareholder commenced a derivative proceeding.

“I read this (as did Judge Tauro) to include the transformation of an existing individual action into a derivative action, whether by counterclaim, by amendment, or (as here) by an amended counterclaim,” he wrote. “This is the only construction that will ensure fulfillment of the statute’s underlying purpose.”

Citing both Superior Court and U.S. District Court rulings, Billings wrote that the 2004 statute represented a significant change from prior practices.

“Section 7.42 is a ‘universal demand’ statute, meaning that there are no longer situations in which — as under the old Chapter 156B and still under Mass. R. Civ. P 23, ... demand may be excused on ground of futility,” he said.

Billings similarly rejected the defendant’s argument that the demand requirement was fulfilled when he asserted his original counterclaim seeking relief individually, which could be obtained only on the corporation’s behalf.

He wrote that, for a variety of reasons, the amended counterclaim would have been defective prior to the passage of the 2004 law.

“To the extent that these are matters of form, they might be curable — even at this late date — by amendment,” he said. “Because no demand was made, however, and because [the statute] is utterly unforgiving in this regard, amendment would be futile.” **MLW**

CASE: *Blake, et al. v. Kennedy, et al. v. Curio Salon, LLC, et al.*,
Lawyers Weekly No. 12-326-08

COURT: Superior Court

ISSUE: Was a plaintiff entitled to dismissal of a counterclaim where the defendant failed to properly make a written demand?

DECISION: Yes