

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BARBARA MICHALCZYK and
WBAJ, LTD.,

Plaintiffs,

v.

JERRY MASLYK, ELIZABETH WDOWIAK,
BARABOO INN, INC. and BONZOS, INC.,

Defendants.

ORDER

11-cv-504-bbc

In this civil suit for damages and injunctive relief, plaintiffs Barbara Michalczyk and WBAJ, Ltd., shareholders of defendant Baraboo, Inn, Inc., contend that defendants Jerry Maslyk and Elizabeth Wdowiak have mismanaged defendants Baraboo Inn, Inc. and Bonzos, Inc. by appropriating corporate earnings for personal use, using corporate personnel for non-corporate endeavors, failing to hold shareholder meetings, eliminating payment of dividends to plaintiffs and failing to pay mortgage payments and real estate taxes. Plaintiffs seek various forms of relief, including an order enjoining defendants from managing Baraboo Inn, an order dissolving Baraboo Inn, Inc. under Wis. Stat. § 180.1430(2), an order appointing a receiver under Wis. Stat. § 180.1432 and monetary damages.

Along with their complaint, plaintiffs filed a motion for a temporary restraining order, dkt. #3, asking the court to “install plaintiff Barbara Michalczyk as the President and CEO of Defendant Baraboo Inn, Inc. for all intents and purposes and restraining Defendants from taking or receiving any monies from Baraboo Inn, Inc. until further order of this Court.” After reviewing plaintiffs’ motion, I conclude that it suffers from several problems and must be denied.

As an initial matter, the jurisdictional allegations in plaintiffs’ complaint are inadequate. Plaintiffs allege that this court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because the parties are completely diverse and the matter in controversy exceeds \$75,000. However, plaintiffs have not made an adequate allegation of diversity under § 1332.

First, plaintiffs have not identified their own citizenship properly. They allege that plaintiff Barbara Michalczyk is a resident of Illinois. However, it is the citizenship, not the residency, of individual persons that matters for diversity jurisdiction purposes. Meyerson v. Harrah's East Chicago Casino, 299 F.3d 616, 617 (7th Cir. 2002). See also McMahon v. Bunn-O-Matic Corp., 150 F.3d 651, 653 (7th Cir. 1998) (“An allegation of residence is inadequate.”). An individual is a citizen of the state in which she is domiciled, that is, where she has a permanent home and principal establishment, and to which she has the intention of returning whenever she is absent from it. Dakuras v. Edwards, 312 F.3d 256, 258 (7th

Cir. 2002). Thus, plaintiff Michalczyk must identify her citizenship. Also, plaintiffs allege that plaintiff WBAJ, Ltd. is an Illinois corporation. However, a corporation is “a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.” 28 U.S.C. § 1332(c)(1). Plaintiff WBAJ, Ltd. must identify its principal place of business.

Similarly, plaintiffs have not identified the citizenship of defendants properly. Plaintiffs allege that Jerry Maslyk and Elizabeth Wdowiak are residents of Poland and Wisconsin. Plaintiffs must identify the citizenship, not the residency, of these defendants. Additionally, plaintiffs must identify the state of incorporation and principal places of business for defendants Baraboo Inn, Inc. and Bonzos, Inc.

In addition to the problems with plaintiffs’ jurisdictional allegations, plaintiffs’ motion for a temporary restraining order fails on the merits. Under Fed. R. Civ. P. 65(b), a court may issue a temporary restraining order without notice to the adverse parties only if

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

These rigorous requirements “reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to

be heard has been granted to both sides of a dispute.” Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County, 415 U.S. 423, 438-39 (1974).

Plaintiffs’ request for a temporary restraining order satisfies neither of Rule 65(b)’s requirements. Plaintiffs have not alleged that they made any effort to provide notice and have not provided any reason why they should not be required to provide defendants notice before receiving a temporary restraining order.

Moreover, the facts proffered by plaintiffs do not “clearly show that immediate and irreparable injury, loss, or damage will result to” plaintiffs before defendants can be heard in opposition. Plaintiffs allege that plaintiff Michalczyk must be placed in control of defendant Baraboo Inn because Baraboo Inn is facing imminent foreclosure caused by defendants Maslyk’s and Wdowiak’s mismanagement of Baraboo Inn. In particular, plaintiffs allege that Baraboo Inn’s loan processor demanded that Baraboo Inn pay \$2,803,121.83 by June 9, 2011 or face foreclosure. However, plaintiffs do not explain how placing Michalczyk in control of the company will prevent foreclosure. On the contrary, plaintiffs’ allegations suggest that defendant Baraboo Inn is broke. It is not clear how a change in management will solve its problems. Nor do plaintiffs explain why they waited so long to file their complaint and motion for a temporary restraining order. Plaintiffs allege in their complaint that defendants have been mismanaging Baraboo Inn and failing to pay

dividends to plaintiffs since 2001. In addition, plaintiffs allege that Baraboo Inn received a foreclosure notice on May 9, 2011 and that it was required to make a full payment on its mortgage by June 9, 2011. Plaintiffs did not file this case until July 18, 2011. This delay suggests that plaintiffs are not suffering such immediate and irreparable injury as to require this court to award them an ex parte temporary restraining order. Accordingly, plaintiffs' failure to satisfy the stringent requirements under Rule 65(b) requires that their motion for a temporary restraining order be denied.

Plaintiffs may wish to file a motion requesting a preliminary injunction. However, they should be aware that I will not consider such a motion until plaintiffs have submitted proof of service on defendants. In addition, before filing a motion for a preliminary injunction, plaintiffs should consider whether some or all of their claims are barred by the Wisconsin's "shareholder standing" rule. Under that principle of corporate law, shareholders of a corporation may not maintain actions individually to redress injuries to the corporation. Krier v. Vilione, 2009 WI 45, ¶ 33, 317 Wis. 2d 288, 312, 766 N.W.2d 517, 528; Notz v. Everett Smith Group, Ltd., 2009 WI 30, ¶ 20, 316 Wis. 2d 640, 653-654, 764 N.W.2d 904, 910. In determining whether a claim should be brought by an individual or on behalf of the corporation, the Wisconsin supreme court has explained that the underlying question is whether "the primary injury is to the corporation or the shareholder." Notz, 2009 WI 30, ¶ 23. "Where the injury to the corporation is the primary injury, and any injury to

stockholders secondary, it is the derivative action alone that can be brought and maintained.” Rose v. Schantz, 56 Wis. 2d 222, 229-30, 201 N.W.2d 593, 598 (Wis. 1972). Thus, plaintiffs should consider whether it is defendant Baraboo Inn, not the shareholders, that have suffered the primary injury caused allegedly by defendants Maslyk’s and Wdowiak’s actions.

ORDER

IT IS ORDERED that the motion for a temporary restraining order, dkt. #3, filed by plaintiffs Barbara Michalczyk and WBAJ, Ltd. is DENIED.

Entered this 19th day of July, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge