

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-TS-00798

SLTE

**PETER SCHIFF and
NEW WAVE LIMITED**

APPELLANTS

VERSUS

**MAO, INC. and
MARVIN A. ORNSTEIN**

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellee certifies that the following persons and/or entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Appellants: Peter Schiff and New Wave, Limited, a defunct corporation organized under the laws of the nation of Nevis.
2. Appellees: MAO, Inc., and Marvin A. Ornstein.
3. Honorable Kathy King Jackson, Circuit Court Judge for the Nineteenth District
4. Counsel for Appellant: Michael L. Fondren, Esq.
5. Counsel for Appellees: Wilkinson, Williams, Kinard, Smith & Edwards and Terry B. Morris, Esq.

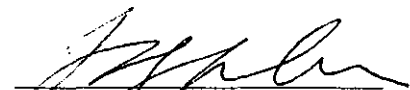

THOMAS L. MUSSELMAN
Wilkinson, Williams, Kinard,
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STATEMENT OF THE ISSUE

THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT AS NEITHER OF THE NAMED PLAINTIFFS WAS A PROPER PARTY TO INSTITUTE AND MAINTAIN THE CAUSE OF ACTION.

STATEMENT OF THE CASE

Nature of the Case and Disposition Below

This matter commenced upon the filing of a Complaint in the Circuit Court of Jackson County, Mississippi, on August 11, 2005. The named Plaintiffs were Peter Schiff and New Wave, Limited. The action was based upon an agreement between three parties, New Wave, Limited, MAO, Inc., and Marvin A. Ornstein, for the development of a casino site in St. Louis, Missouri. Discovery ensued.

Subsequently, MAO, Inc., and Marvin A. Ornstein filed a motion for summary judgment arguing that neither plaintiff was a proper party to the action. On April 17, 2009, the Circuit Court of Jackson County, Mississippi, Honorable Kathy King Jackson presiding, granted summary judgment in favor of MAO, Inc., and Marvin A. Ornstein. A Final Judgment was entered on April 28, 2009. Plaintiff timely filed his Notice of Appeal on May 13, 2009.

Statement of the Facts

On December 7, 1994, an Agreement was entered into between New Wave, Limited, a corporation organized under the laws of the island nation of Nevis and Marvin Ornstein, on his personal behalf and as then-President of MAO Gaming, Inc. *Appellee's Record Excerpts, R.E. 1.* The Agreement was executed for New Wave, Limited, by Peter Schiff, asserted to be its president.

Peter Schiff was not a personal signatory to the Agreement.

The Agreement involved an investment by New Wave, Limited, (hereinafter New Wave) in

the development of a St. Louis, Missouri, location as a potential gaming site. The Agreement called for a payment to be made by MAO Gaming, Inc., to New Wave, Limited, on or before eighteen months after the execution of the Agreement, thus, no later than June 7, 1996. MAO Gaming, Inc., failed to make the payment on or before June 7, 1996, as the project encountered political difficulties. Peter Schiff was aware that MAO Gaming, Inc., failed to make the scheduled payment. New Wave, Limited, took no legal action to enforce the terms of the Agreement between 1996 and 2005. New Wave, Limited, was dissolved by the Nevis government on December 12, 1996, for failure to pay fees. *Appellee's Record Excerpts, R.E. 2.*

New Wave, Limited, is no longer a viable entity under the laws of the jurisdiction in which

it was formed. New Wave had three years from the date of dissolution to be restored to the corporate register under Nevis law. *Appellee's Record Excerpts, R.E. 3, Nevis Business Corporation Ordinance, § 99(3).* A corporation which is not restored to the register within three years of the date of removal shall be deemed to have commenced to wind up and dissolve. *Appellee's Record Excerpts, R.E. 3, Nevis Business Corporation Ordinance, § 99(6).* A corporation which is not restored shall be continued for a term of three years from dissolution for the purpose of prosecuting and defending suits by or against them. *Appellee's Record Excerpts, R.E. 3, Nevis Business Corporation Ordinance, § 100(1).* Thus, New Wave ceased to exist as a business entity no later than December 12, 2002. The underlying lawsuit at issue was filed on August 11, 2005.

No action was taken by New Wave to restore it to the corporate register in Nevis. No action

was taken by New Wave to wind up its affairs and dissolve after the expiration of restoration period.

No action was taken by New Wave to prosecute any suit within the three year period of dissolution. New Wave, Limited, is no longer a viable entity under the laws of the jurisdiction in which it was established. The time in which New Wave was allowed to proceed to dissolution has expired. New Wave, Limited, is no longer able to initiate or maintain an action as it is no longer a viable entity.

Mr. Schiff, by his own admission, was a stockholder in New Wave, Limited. The Agreement of December 7, 1994, was between New Wave, MAO, Inc., and Marvin A. Ornstein. Mr. Schiff was not a personal signatory to the Agreement and is unable to initiate or maintain an action based upon the Agreement.

SUMMARY OF THE ARGUMENT

Plaintiff, Peter Schiff, is not a personal signatory to the Agreement made the basis of the action. As such, Peter Schiff has no standing to maintain an action based upon the Agreement. Peter Schiff is not a proper party to the action based upon the Agreement of December 7, 1994.

Plaintiff, New Wave, Limited, is a corporation organized under the laws of the nation of Nevis. New Wave was a signatory to the Agreement of December 7, 1994. New Wave was dissolved in December of 1996 for failure to pay required fees. New Wave took no action to wind up its affairs and the time to initiate legal actions has expired. New Wave is no longer a viable entity. As such, New Wave, Limited, cannot initiate or maintain an action based upon the Agreement of December 7, 1994, as New Wave no longer exists.

Neither party is a proper party to initiate or maintain an action based upon the Agreement of December 7, 1994, and the Circuit Court of Jackson County properly granted summary judgment.

STANDARD OF REVIEW

The well-established standard of review in reviewing a trial court's grant or denial of summary judgment is *de novo*. *One South, Inc. v. Hollowell*, 963 So.2d 1156, 1160 (Miss.2007) (citing *Hubbard v. Wansley*, 954 So.2d 951, 956 (Miss.2007)). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Miss. R. Civ. P.* 56(c). "We will not reverse the trial court's decision unless it appears that triable issues of fact remain when the facts are viewed in the light most favorable to the nonmoving party." *Moore v. Mem'l Hosp.*, 825 So.2d 658, 663 (Miss.2002) (citing *Robinson v. Singing River Hosp. Sys.*, 732 So.2d 204, 207 (Miss.1999)).

ARGUMENT

Mr. Schiff is Not a Signatory to the Agreement
and Cannot Maintain an Individual Action
Against MAO, Inc., and Marvin A. Ornstein.

Mr. Schiff takes issue that the Circuit Court relied upon the settled law as stated in *Durham v. University of Mississippi*, 966 So.2d 832 (Miss. App. 2007), and *Bruno v. Southeastern Services, Inc.*, 385 So.2d 620 (Miss. 1980). As Mr. Schiff is forced to admit, the rule in Mississippi clearly states that “an action to redress injuries to a corporation, whether in contract or in tort, cannot be maintained by a stockholder in his own name, but must be brought by the corporation because the action belongs to the corporation and not the individual stockholder, whose rights are merely derivative. The rule applies even though the complaining stockholder owns all or substantially all of the stock in the corporation.” *Bruno*, 385 So.2d at 622. Schiff seeks to avoid the rule by arguing that statements made prior to the execution of the Agreement on December 7, 1994, are the basis of an action alleging fraud. No such exception exists under the laws of Mississippi.

Fatal to Mr. Schiff’s argument, the Agreement was executed by New Wave, MAO, Inc., and Mr. Ornstein. Any action based upon the Agreement must be brought by those parties. Even if Mr. Schiff supplied all the funds invested by New Wave in the Agreement, New Wave must pursue any action based upon the Agreement. The rule is settled law in this State and many other states. To allow an individual stockholder to pursue a personal action against a business partner of a corporation in which the stockholder owns stock would create chaos in the business world. There is a valid reason for the rule of *Bruno*.

Mr. Schiff argues that he was a victim of fraud in his personal capacity. If, as he argues in his brief, the "fraud" was perpetrated upon him "before New Wave Limited was formed," then the statute of limitations expired several years prior to the filing of the instant matter. Mr. Schiff argues that he was defrauded personally prior to the Agreement of December 7, 1994. However, all the issues involved in the "fraud" are directly related to the Agreement. As noted above, issues related to the Agreement must be pursued by the corporation, not an individual stockholder. Mr. Schiff's argument fails as he is not a proper party to litigate any issue related to the Agreement.

New Wave, Limited, is Not a Viable Entity and
Can No Longer Maintain an
Action Against MAO, Inc., and Marvin A. Ornstein.

Appellant, Peter Schiff, only raised the issue of whether the action was properly dismissed as to Peter Schiff and does not raise the issue of whether the Court properly granted summary judgment to MAO, Inc., and Marvin A. Ornstein as to New Wave, Limited, in his brief. Thus, it is apparent that Mr. Schiff does not contest the grant of summary judgment based upon the dissolution of the corporation under Nevis law. No action was taken in the time allowed under Nevis law to wind up its affairs. The Circuit Court properly granted summary judgment as New Wave, Limited, was no longer a viable entity when the instant action was filed. Mr. Schiff did not raise this issue in his brief and thus, this portion of the Order Granting Summary Judgment is uncontested.

As noted above, New Wave, Limited, ceased to be a legal entity on December 6, 1996. New Wave can no longer maintain an action in the courts of this State or in any other jurisdiction. The Circuit Court of Jackson County properly granted summary judgment.

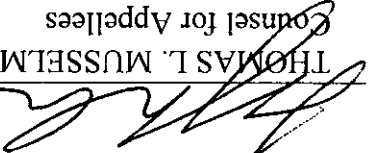
CONCLUSION

Mr. Schiff was not a signatory to the Agreement executed on December 7, 1994. Mr. Schiff is not a proper party to litigate any issue relating to the Agreement. Issues relating to the Agreement must be litigated by the corporation, New Wave, Limited, as it was a signatory to the Agreement. New Wave, Limited, is no longer a viable entity having been dissolved in December of 1996. New Wave, Limited, took no action to wind up its affairs in the three years after dissolution as allowed under the laws of the nation of Nevis. New Wave, Limited, can no longer maintain an action to litigate any issue related to the Agreement as it no longer exists as a legal entity.

Peter Schiff has no personal right of action merely because he owned stock, invested funds used by New Wave in the Agreement or was involved in negotiations on behalf of New Wave resulting in the execution of the Agreement. Settled law in the State of Mississippi prohibits a stockholder from maintaining a personal action based upon corporate action.

The Circuit Court of Jackson County properly granted summary judgment as neither of the named plaintiffs is a proper party to institute and maintain the cause of action.

Respectfully submitted,

MAO, INC., and MARVIN A. ORNSTEIN
 BY: 
 THOMAS L. MUSSELMAN
 Counsel for Appellees

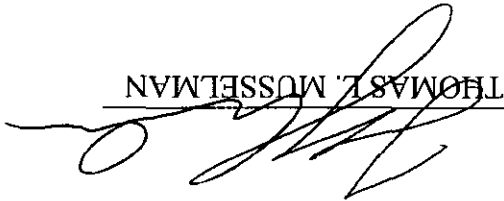
CERTIFICATE OF SERVICE

I, THOMAS L. MUSSELMAN, of the firm of Wilkinson, Williams, Kinard, Smith & Edwards, do hereby certify that I have served by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief to:

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Circuit Court Judge
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THIS, the 19th day of October, 20 09.


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