

NO. A06-0959

State of Minnesota
In Court of Appeals

SINUON LEIENDECKER,

Appellant,

vs.

ASIAN WOMEN UNITED OF MINNESOTA,
QUOC-BAO DO, AND SUSHILA SHAH,

Respondents.

APPELLANT'S BRIEF

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LEGAL ISSUES

1. **WHETHER THE TRIAL COURT ERRED IN RULING THAT APPELLANT'S TORT CLAIMS WERE SUBJECT TO THE COMPULSORY COUNTERCLAIM RULE.**
2. **WHETHER THE TRIAL COURT ERRED IN RULING THAT APPELLANT'S TORT CLAIMS WERE SUBJECT TO THE COMPULSORY COUNTERCLAIM RULE.**
3. **WHETHER THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT'S CLAIMS AROSE OUT OF THE SAME TRANSACTION THAT WAS THE SUBJECT OF RESPONDENTS' THIRD PARTY COMPLAINT.**

STATEMENT OF THE CASE AND FACTS

This case came before the Honorable David C. Higgs, Ramsey County District Court, on Respondents' Motion to Dismiss and Appellant's Cross-Motion for Partial Summary Judgment. The Court granted defendants' motion finding that plaintiff's present claims were barred under the compulsory counterclaim rule. (App. 1-3). Appellant now appeals that decision.

Respondent Asian Women United of Minnesota ("AWUM") operates a non-profit corporation, and is governed by Minn. Stat. Chap. 317A, its bylaws and Minnesota law. In 1999, Sinuon Leiendecker ("Leiendecker") became the Executive Director of AWUM. (App. 4). Leiendecker performed her duties successfully and received bonuses and regular raises. *Id.* During her time as Executive Director, AWUM's annual operating budget grew from approximately \$220,000 to over \$1,000,000, and its staff increased from five to twenty five persons. *Id.*

Respondents Sushila Shah ("Shah") and Quoc-Bao Do ("Bao Do") each signed a one-year board membership contract with AWUM in 1996 and 1997, respectively. (App. 4-5). Their contracts violated AWUM's bylaws, which require all board members to serve a three-year term. (App. 4-5; App. 9). After Shah and Bao Do's one-year membership contracts expired, they continued to serve on the Board without a formal election as required under AWUM's bylaws. (App. 4-5).

Respondent Shah resigned from the board in 2002, consistent with AWUM's bylaws that provide that "no director shall serve more than two consecutive three-year terms." (App. 5, 9). Bao Do, however, continued to serve as a board member after his second illegal term expired on June 30, 2003. (App. 4). Additionally, in 2003, Bao Do unilaterally reappointed Shah to the Board. (App. 5). Under AWUM's bylaws, vacancies on the board "shall be filled by the affirmative vote of a majority of the remaining directors." (App. 11). No vote was taken. (App. 5).

In the early 2003, Leiendecker regularly reminded Bao Do that he was scheduled to resign as of July 1, 2003, and that they needed to get the board straightened out by the new fiscal year. (App. 5). Bao Do, however, made no effort to resolve the problems with the Board. *Id.* Throughout 2003, Leiendecker continued to complain to Bao Do, Shah and others that AWUM was operating with an illegal board by allowing certain members to remain on the Board beyond their respective terms and by failing to seat the requisite number of board members. *Id.* Leiendecker complained that AWUM's actions, including the application for grants and various employment actions proposed by the illegal board, violated AWUM's bylaws and Minnesota law. *Id.*

Leiendecker sought counsel from Jean Miller ("Miller"), a representative of the Minnesota Center for Crime Victim Services, a state agency that provided funding to AWUM. *Id.* In or around June 2003, Miller told Leiendecker that

AWUM needed to get its Board in compliance. *Id.* Miller referred Leiendecker to attorney Charlie Revine (“Revine”). *Id.* Leiendecker continued to have regular phone conversations with both Miller and Revine throughout the summer of 2003 regarding the illegality of the Board. *Id.*

During a board meeting on August 25, 2003, Leiendecker, along with board member Chanda Sour and AWUM employees Malena Vang and Malay Nasby, objected to Bao Do and Shah’s continued presence on the Board. *Id.* Shortly thereafter, Bao Do and Shah placed Leiendecker on probation. *Id.* Bao Do and Shah took this action without allowing the board to review it, in violation of AWUM’s bylaws. *Id.*

In September 2003, Leiendecker arranged a meeting between Bao Do and consultant David Cummings (“Cummings”) to discuss the problems with the Board. *Id.* During this meeting, Cummings reiterated Bao Do’s invalid role as a board member and explained that it would be unlawful for Bao Do, or any other invalid board members, to sign grant proposals on behalf of AWUM. (App. 5-6).

In October 2003, based on Revine’s recommendation, Leiendecker met with prospective new board members Nia Arradando (“Arradando”), Pa Vang (“Vang”), Naomi Mueller (“Mueller”) and Akiko Tanka (“Tanka”) after they had expressed an interest in joining the Board. (App. 6). During this meeting, Leiendecker disclosed to the prospective board members that the current Board

was not in compliance with AWUM's bylaws. *Id.* Leiendecker also informed the prospective board members of Bao Do and Shah's demand that she use restricted funds to finance a party in January 2004. *Id.* Bao Do and Shah subsequently learned of this meeting. *Id.*

Arrandondo, Vang, Mueller and Tanka ultimately joined the Board. *Id.* Bao Do and Shah continued to serve on the Board, as well. *Id.* On October 27, 2003, the Board convened its first meeting with its new members. *Id.* Following this meeting, the board members, in an executive session, discussed Leiendecker's concerns regarding the illegality of the Board. *Id.* During this meeting, Bao Do and Shah raised concerns over Leiendecker's job performance. *Id.* They also informed the new board members that Leiendecker had misappropriated funds. *Id.* Bao Do and Shah knew this statement was false when they made it, as the Board had previously determined that Leiendecker had not misappropriated the funds at issue. (App. 18).

On November 4, 2003, AWUM's invalid Board, which included Bao Do and Shah, ("Old Board"), unlawfully held a secret meeting during which it voted to terminate Leiendecker's employment. (App. 6). The Board, however, did not to carry out its decision, or communicate anything about the vote to Leiendecker. Leiendecker only learned of her "impending" termination when Bao-Do inadvertently sent her an e-mail containing the minutes from the board meeting.

Id. Even though the Board, ostensibly, passed a resolution to terminate Leiendecker, it continued to recognize her as the Executive Director. Leiendecker continued to receive compensation and benefits. (App. 24). The Board also continued to direct Leiendecker to act in her role as Executive Director. For example, at the November 24, 2003 board meeting, the Board directed Leiendecker to utilize agency funds for a retreat. (App. 30). For all intents and purposes, Leiendecker continued to serve as AWUM's executive director, despite the Board's action.

On or about November 25, 2003, Leiendecker gathered some outside individuals not affiliated with AWUM to form a new board ("New Board"). (App. 6). A dispute ensued over which board was in control of AWUM. Nevertheless, Leiendecker continued to serve as the Executive Director. (App. 6).

On December 7, 2003, the Old Board, representing itself as an agent of AWUM, sent a letter to the Minnesota Department of Commerce, Office of the Minnesota Attorney General, Office of Justice Programs, Minnesota Office of the State Auditor, and the Minnesota Secretary of State, alleging that Leiendecker had engaged in "serious mismanagement of agency funds and questionable conduct." (App. 32-43). The letter specifically noted that Leiendecker had "issued [sic] agency check to herself in the amount of \$10,000." *Id.* In another letter dated December 12, 2003, AWUM informed Paychex that Leiendecker requested a

check to herself for \$10,000 without Board approval. (App. 44). These allegations were patently false. Leiendecker had issued herself the check for \$10,000 in back pay only after she had received verbal authorization from Bao Do in June 2003. (App. 6). The Board reviewed the situation and determined that Leiendecker had made an “honest mistake,” and found no basis to take disciplinary action against her. (App. 18). None of these facts were represented in the letters the Old Board sent to the various state and private agencies. (App. 32-44).

On December 18, 2003, the New Board filed an Application for a Temporary Restraining Order to preclude the Old Board from any involvement in AWUM’s operations. (App. 45-47). The New Board subsequently served a Complaint for Declaratory and Equitable relief against the Old Board asking that the Court declare: (1) that the Old Board was not comprised of validly elected board members, (2) that the Old Board was not entitled to act on behalf of the corporation, (3) that the new board created by Leiendecker was a valid act consistent with the fiduciary duty of the executive director; or in the alternative that (4) new members be recruited, nominated and validly elected to the Board. (App. 54).

On January 16, 2004, the Old Board served a Third-Party complaint on Leiendecker and the New Board alleging that the Old Board was the valid AWUM Board. (App. 19-25). On February 23, 2004, Leiendecker Answered the Third-

Party complaint. (App. 55-57). On February 26, 2004, the Honorable Gary Bastian, Ramsey County District Court, issued an order giving control of AWUM's operations to the Old Board, excluding Bao Do and Shah. (App. 58-64). Pursuant to the Order, the Board was required to transact all business in formal meetings upon proper notice. (App. 64). AWUM's bylaws require five days notice. (App. 10). The Order further provided that the action to terminate Leiendecker in November 2003 was voided, due to participation by illegitimate board members. (App. 64). Within one hour of receiving Judge Bastian's Order, AWUM summarily terminated Leiendecker's employment. (App. 6).

On August 29, 2005, Leiendecker sued respondents alleging termination in violation of the Minnesota Whistleblower Act, breach of contract, violation of Minn. Stat. Chap. 317A, defamation, and tortious interference with contract. This appeal follows the trial court's dismissal of her lawsuit.

ARGUMENT

I. STANDARD OF REVIEW

On appeal from the grant of a motion to dismiss this court accepts the factual allegations in the complaint as true, views them in the light most favorable to the appellant, and reviews the district court's legal conclusions de novo. *See Granville v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*, 668 N.W.2d 227, 229-30 (Minn.App.2003). This court is not bound by and need not give deference to a

district court's decision on a purely legal issue. *Modrow v. JP Foodserve, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

II. THE TRIAL COURT ERRED IN RULING THAT APPELLANT'S TORT CLAIMS WERE SUBJECT TO THE COMPULSORY COUNTERCLAIM RULE.

The trial court erroneously found that Leiendecker's tort claims were barred by the compulsory counterclaim rule. The court's decision is inconsistent with the history of the rule and this Court's interpretation of it. The trial court's decision must be reversed. The counterclaim rule, as originally drafted, provided that counterclaims were compulsory if they arose out of the "same transaction or occurrence." *House v. Hanson*, 72 N.W.2d 874, 877-79 (Minn. 1955). There was concern, however, that if the rule was approved as drafted tort counterclaims would be compulsory. (*Id.*) The Supreme Court Advisory Committee in turn deleted the word "occurrence" from the rule. The court then adopted the rule with the express understanding and intent that the omission of the word "occurrence" would insure that tort counterclaims would not be compulsory. *Id.* In light of this history, the *House* court held that the word "transaction" as used in Rule 13.01 did not embrace tort claims.

Leiendecker argued to the trial court that her defamation and tortious interference claims were not subject to the compulsory counterclaim rule. The court concluded that they were since the original action – the declaratory judgment

complaint – was a nontort action. (App. 3). The district court ignored this Court’s prior decisions, which have held that the compulsory counterclaim rule does not apply to tort claims in a subsequent action, irrespective of the nature of the original action.

In *Rhines v. Miles Home Division of Insilco Corp.*, 1987 WL 28910 (Minn.Ct.App. 1987) (App. 65-66), this Court held that the plaintiff was not barred from bringing a personal injury claim simply because he failed to raise the claim in the prior mechanic-lien foreclosure action. In doing so, this Court noted that the Minnesota Supreme Court in *House* made perfectly clear that a “tort claim is not a compulsory counterclaim.” (App. 66). Similarly, in *Powell v. Chubb & Son, Inc.*, 1993 WL 107779 (Minn.Ct.App. 1993) (App. 67-70), this Court held that plaintiff was not required to bring her conversion claim in the prior contract action because conversion is tort, not subject to the compulsory counterclaim rule. *Id.*

The district court disregarded *Rhine* and *Powell*, as well as the history behind Rule 13.01. Instead, it apparently relied on a statement in *St. Stephen State Bank v. Johannsen*, 2003 WL 1875500 (Minn.Ct.App. 2003) (App. 71-77), cited by the respondent. In *Johannsen*, this Court stated that “[a]ppellants misread *House* to say that counterclaims that sound in tort are never compulsory claims. But *House* actually says that there are no compulsory counterclaims in a tort

action.” *Id.* This statement is dictum.¹ As the *Johannsen* court noted, “whether the current claims were compulsory counterclaims in the foreclosure action is not the issue in this appeal...” *St. Stephens State Bank*, 2003 WL 1875500. Accordingly, such dictum is insufficient to support the trial court’s decision to ignore controlling precedent.

Rhine and *Powell* are wholly consistent with the relevant history and intent of Minn. R. Civ. P. 13.01. These decisions make clear that, in analyzing whether a claim is subject to the compulsory counterclaim rule, the court must focus on the nature of the subsequent claim, not on whether the original action was a tort claim. The trial court misapprehended this distinction and erroneously deprived appellant of her day in court. This Court must correct that wrong.

III. THE TRIAL COURT ERRED IN CONCLUDING THAT APPELLANT WAS ESTOPPED FROM ASSERTING HER NONTORT CLAIMS.

The trial court erroneously concluded that Leiendecker was estopped from asserting her nontort claims because it determined that they were “ripe” when she answered respondents’ third party complaint. (App. 3). The trial court’s conclusion is contrary to the evidence. Leiendecker presented evidence to the court that her whistleblower, breach of contract and Minn. Stat. Chap. 317A claims

did not arise until after she responded to the third party complaint. The court's conclusion otherwise must be reversed.

Generally, under the compulsory counterclaim rule, a party must assert all counterclaims against any opposing party arising out of the transaction that is the subject matter of the opposing party's claim. Minn. R. Civ. P. 13.01. Rule 13.01 implicitly requires that a counterclaim must be mature at the time the pleader is required to respond to the complaint. *See* Minn. R. Civ. P. 13.01. A mature claim is a claim or cause of action that exists, and upon which suit may properly be brought. 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 13.01 (4th ed. 2002). It is a claim that will not be dismissed for being initiated prematurely. *Id.* No condition or event must transpire before suit may be commenced. *Id.* Claims maturing after commencement of the action, but before service of the defendant's answer is due must be pleaded by the defendant. *Id.*

Here, Leiendecker's whistleblower, breach of contract, and violation of Minn. Stat. Chap. 317A claims all arise out her termination from employment, which occurred on February 26, 2004. Leiendecker served her Answer to respondents' Third-Party Complaint on February 23, 2004. Because her nontort claims arose after she answered respondents' complaint, they were not ripe and thus subject to the compulsory counterclaim rule. The trial court's erroneous decision to the contrary must be reversed.

A. Whistleblower Claim

Appellant alleged in her complaint that respondents terminated her employment in violation of the Minnesota Whistleblower law.² To establish a whistleblower claim, Leiendecker must show that (1) she engaged in statutorily protected conduct, (2) respondents took adverse action against her, and (3) a causal connection exists between the two. *Bersch v. Rgnonti & Assoc.*, 584 N.W.2d 783 (Minn. Ct. App. 1998).

Leiendecker repeatedly complained to respondents that they were conducting AWUM's business as an illegal board. The board illegally terminated her on February 26, 2004.³ Leiendecker alleges that the board terminated her because of her good faith assertions that it was acting illegally. Because adverse action is a prerequisite to a whistleblower claim, Leiendecker's claim was not ripe until respondents terminated her employment. In other words, an "additional event had to transpire before suit could be commenced" under Minnesota's Whistleblower law. 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 13.01 (4th ed. 2002). Thus, Leiendecker's had no whistleblower claim when she

² Under Minnesota's Whistleblower law, an employer shall not discharge, discipline, threaten or otherwise discriminate against an employee because the employee reported a suspected a violation of law to an employer. Minn. Stat. § 181.932.

³ Although the board apparently voted to terminate appellant on November 4, 2003, it failed to carry out its decision, or to communicate anything about the vote to Leiendecker. The only reason Leiendecker learned of her "impending" termination was because Bao-Do inadvertently sent her an e-mail containing the minutes from the board meeting. Furthermore, the board continued to recognize Leiendecker as the Executive Director. Appellant continued to receive compensation and benefits. The board also continued to direct appellant to act in her role as Executive Director. For example, at the November 24, 2003 board meeting, the Board directed Leiendecker to utilize agency funds for a retreat. After the New Board took over AWUM's operations on November 25, 2003, appellant remained on as Executive Director, until her termination on February 26, 2004.

answered respondents' complaint on February 23, 2004. Not only did she have no claim, she had no damages at that time.

A claim is mature when the plaintiff has sustained "some" damage.

Hermann v. McMenemy & Severson, 590 N.W.2d 641, 643 (Minn. 1999). Prior to February 26, 2004, Leiendecker was still receiving compensation and benefits as the Executive Director of AWUM. (App. 4). Her damages did not begin to accrue until after that ill-fated date. Leiendecker's whistleblower claim was not ripe until February 26, 2004 and therefore was not subject to the compulsory counterclaim rule. This Court should reverse the trial court's decision.

B. Breach of Contract and Violation of Minnesota Statute § 317A

Claims

Leiendecker's breach of contract and Minn. Stat. Chap. 317A claims stem from the fact that AWUM terminated her on February 26, 2004 at a meeting held without proper notice. Under AWUM's bylaws and Minn. Stat. § 317A.237, an act of the Board shall be taken by an affirmative vote at a *duly held meeting*. (App. 11). AWUM's bylaws provide that five days written notice must be given of all meetings. (App. 10).⁴ Respondents terminated Leiendecker *one hour* after receiving notice of Judge Bastian's decision that the Old Board, excluding Bao Do and Shah, was in charge. (App. 6).

⁴ Leiendecker in her complaint asserts her employment with AWUM was governed by AWUM's bylaws and Minn. Stat. § 317A.

Like her whistleblower claim, the basis for Leiendecker's contract and statutory claim arose from respondents' decision to terminate her employment on February 26, 2004, three days after she answered respondents' complaint. Because her claims were not ripe until that date, they were not subject to the compulsory counterclaim rule. The trial court's decision is wrong, and this Court should correct it.

IV. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT'S CLAIMS AROSE OUT OF THE SAME TRANSACTION THAT WAS THE SUBJECT OF RESPONDENTS' THIRD PARTY COMPLAINT

Even if the Court finds that Leiendecker's claims were mature when she answered respondents' complaint, they do not arise from the same "transaction" as the facts supporting respondents' complaint. The Minnesota Supreme Court has not endorsed a specific test to determine whether a claim arises out of the same transaction. 1 *Minn. Prac., Civil Rules Annotated R. 13.01*. Federal law, however, may inform the Court's analysis of this issue. Federal courts use the "logical relationship" test, in interpreting the federal counterpart to Minn. R. Civ. P. 13.01. *Fox Chemical Co. v. Amsoil, Inc.*, 445 F.Supp. 1355, 1361 (D.Minn. 1978). Under this test, a claim bears a logical relationship to the original action if it arises out of the same aggregate of operative facts as those supporting the original claim. In other words, the same aggregate of operative facts serve as the basis for both actions. *Id.*

The transactions in respondents' Third Party Complaint and those in appellant's lawsuit arise from two distinct sets of operative facts. In the Third Party Complaint the relevant transaction pitted the New Board against the Old Board and called into question the scope of their respective authority to conduct AWUM's business. In Leiendecker's case, the pertinent transaction is her termination.

The Third Party Complaint was a declaratory judgment action to determine which board was in control of AWUM. The relevant facts supporting that claim included: (1) the Old Board's failure to abide by its own bylaws by failing to keep proper minutes, failing to achieve quorums, at times having some members exceed term limits, not recording votes on board actions, and not keeping the requisite number of board members; (2) the Old Board's use of funding for individual member's benefits; (3) Leiendecker's establishment of the New Board; and (4) the new board taking control over AWUM without any prior notice to the members of the Old Board. (App.58-64).

The evidence Leiendecker's action includes: (1) Leiendecker's good faith reports to AWUM and others of violations of AWUM's bylaws and Minnesota law; (2) AWUM terminating appellant for opposing the behavior of the Old Board; (3) the Old Board terminating appellant at a meeting conducted without proper notice under AWUM's bylaws; and (4) AWUM implying to numerous state and private entities that appellant embezzled \$10,000 from AWUM.

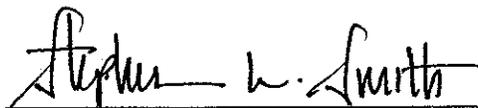
Because the same operative facts do not serve as the basis for both the Third Party Complaint and Leiendecker's present action, the two claims do not bear a logical relationship to one another. The trial court erred in concluding that present claims were subject to the compulsory counterclaim rule. This Court must reverse that decision.

CONCLUSION

For all of the reasons cited above, this Court should reverse the trial court's decision to grant respondents' motion to dismiss.

Dated: 8.13.06

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A06-0959

STATE OF MINNESOTA
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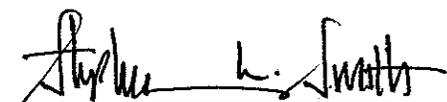
CERTIFICATION OF BRIEF LENGTH

Asian Women United of Minnesota,
Quoc Bao-Do, and Sushila Shah.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional font. The length of this brief is 4,204 words. This brief was prepared using Microsoft Word 2002.

DATED: *8.13.06*

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).