



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ANTHONY J. TESTA, JR.,)
)
 Plaintiff,)
)
 v.)
)
 NIXON UNIFORM SERVICE, INC.,)
 MURRAY BERSTEIN, AND JOHN)
 DOES 1-5,)
)
 Defendants.)

C.A. No. 3886-VCS

MEMORANDUM OPINION

Date Submitted: October 24, 2008
Date Decided: November 21, 2008

Anthony J. Testa, Jr., Wilmington, Delaware, *Pro Se Plaintiff*.

William W. Bowser, Esquire, Timothy J. Snyder, Esquire, Curtis J. Crowther, Esquire, D. Fon Muttamara-Walker, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware, *Attorneys for Defendants*.

STRINE, Vice Chancellor.

I. Introduction

In this decision, this court is asked to determine whether 8 *Del. C.* § 111(a)(2), which gives this court jurisdiction over an “agreement by which a corporation creates or sells . . . rights or options respecting its stock,”¹ invokes this court’s jurisdiction over a claim that a former executive received less than he was due under an incentive compensation plan that provided employees with rights to cash payments tied to the corporation’s stock performance. Because the plan did not give the plaintiff any right to acquire stock, but only the right to receive cash based on a formula tied to the company’s stock price, I find that § 111(a)(2) does not apply to the former executive’s claim for breach of contract. Given that, and the fact that the former executive otherwise fails to plead a basis for equitable jurisdiction, he must transfer his claims to the Superior Court or suffer dismissal.

II. Factual Background

This action is before the court on a motion to dismiss for lack of subject matter jurisdiction. Plaintiff Anthony J. Testa brought this action to recover money he believes he is entitled to under defendant Nixon Uniform Service, Inc.’s “Stock Appreciation Rights Plan” (the “Plan”). Testa claims that Nixon failed to pay him the sum he was entitled to under the Plan when he left employment with Nixon. Rather than plead his case solely as a breach of contract action, Testa, who is a lawyer representing himself pro se, has proliferated duplicative theories of recovery.

¹ 8 *Del. C.* § 111(a)(2).

The defendants, who are Nixon and its CEO, Murray Berstein,² claim that this court does not have subject matter jurisdiction over this case because Testa does not assert equitable claims and has viable remedies at law. In response, Testa argues that he has properly invoked this court’s jurisdiction, principally because, he argues, this dispute over whether he received the proper sum under the Plan implicates 8 *Del. C.* § 111(a)(2), which gives this court jurisdiction over “[a]ny civil action to interpret, apply, enforce or determine the validity of the provisions of: [a]ny instrument, document or agreement by which a corporation creates or sells, or offers to create or sell, any of its stock, or any rights or options respecting its stock.”³ Whether or not § 111 applies to Testa’s claim that Nixon breached the Plan is the central issue on which this court’s jurisdiction turns.

The key facts relevant to resolving this dispute emerge in an undisputed way from Testa’s complaint and the documents it incorporates, which include the Plan. Under the Plan, Nixon employees can be awarded stock appreciation rights (“SARs”). Each SAR has a notional value under the plan of 1/100 of the amount that Nixon common stock has appreciated since that SAR was issued.⁴ Upon certain events, the holder is to be paid this notional value.⁵ Two such situations are relevant here. If a “change in control” within the meaning of the Plan occurs, then the full value of the SAR becomes payable.⁶

² Testa has also purported to sue certain as yet unnamed members of the committee that Nixon’s Board of Directors established to oversee the Plan.

³ 8 *Del. C.* § 111(a)(2).

⁴ Compl. Ex. A art. 4.1.

⁵ *Id.* art. 7.

⁶ *Id.* art. 7.1.

Likewise, when a SAR holder terminates her employment with Nixon, she has a right to receive 50% of the value of her SARs, but the other 50% is forfeited.⁷

Testa was Nixon's Vice President, Treasurer, In-House Counsel, and Chief Financial Officer until July 2007.⁸ Over the course of his employment, he was awarded 950 SARs.⁹ After Testa terminated his employment with Nixon, Bernstein contacted Testa and informed him that he was entitled to \$42,674.50 under the Plan, after the application of the 50% forfeiture provision that applies upon termination of employment.¹⁰ Testa believes that he is entitled to receive more under the Plan, contending (1) that the valuation of Nixon's common stock used to calculate the value of his SARs was too low; and (2) that a change in control of Nixon occurred on March 14, 2007, while Testa was still employed with Nixon, and thus Testa was entitled to the full value of his SARs when the alleged change in control occurred, instead of the 50% of the value as of his termination of employment that he was offered.

Testa's core claim is obvious: he asserts that Nixon breached its contractual obligations under the Plan. But, rather than just plead his core claim, Testa has advanced counts of estoppel, violation of the Delaware Wage Payment and Collection Act,¹¹ and breach of the implied covenant of good faith and fair dealing. In brief snippets in his complaint, Testa also suggests that he wishes to assert other theories, including unjust enrichment and negligence. And, despite the fact that he is asking solely for the money

⁷ *Id.* art. 7.4.

⁸ Compl. ¶¶ 15, 24.

⁹ *Id.* ¶ 27.

¹⁰ *See id.* ¶ 36.

¹¹ 19 *Del. C.* § 1113.

that he believes he is due under the Plan and interest on that sum, Testa has asked for remedies ranging from an injunction against further breaches of the plan and violations of the Delaware Wage Payment and Collection Act to specific performance.¹²

III. Legal Analysis

The Court of Chancery is a court of limited jurisdiction. Chancery has no power to adjudicate “any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State.”¹³ “[T]his Court can acquire subject matter jurisdiction over a case in three ways: (1) the invocation of an equitable right; (2) the request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction.”¹⁴ As the plaintiff, Testa must show that subject matter jurisdiction in this court exists.¹⁵ And, when examining the existence of subject matter jurisdiction “this Court will look beyond the language of a complaint and examine the substance and nature of the relief being sought.”¹⁶

A. 8 Del. C. § 111(a)(2) Does Not Provide Jurisdiction Over Testa’s Claims

The primary basis for subject matter jurisdiction Testa cites is 8 Del. C. § 111(a)(2). Testa claims that § 111(a)(2) is implicated by any corporate contract that gives someone rights that derive their value from a company’s stock in any way. Thus, he claims that the Plan, which only gives recipients the right to certain cash

¹² Compl. at 25.

¹³ 10 Del. C. § 342.

¹⁴ *Medek v. Medek*, 2008 WL 4261017, at *3 (Del. Ch. Sept. 10, 2008) (citations omitted).

¹⁵ *See Block Fin. Corp. v. Inisoft Corp.*, 2003 WL 136182, at *2 n.4 (Del. Ch. Jan. 7, 2003) (“It is the Plaintiff’s burden to demonstrate that equitable subject matter jurisdiction exists.”).

¹⁶ *Prestancia Mgmt. Group, Inc. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at *3 (Del. Ch. May 27, 2005) (citation omitted).

payment that are tied to the value of Nixon common stock, is an agreement by which, in the words of § 111(a)(2), a corporation “create[d] . . . rights respecting its stock.”¹⁷ He does so even while admitting that the Plan never gave any beneficiary *any* right to acquire stock in Nixon and that Nixon only promised beneficiaries certain cash payments tied to a contractual valuation of Nixon common stock. This is a new question under a relatively new statute.¹⁸

Although Testa has an arguable position, I believe that the defendants are correct when they contend that § 111(a)(2) only addresses contracts where corporations grant rights to receive stock upon the occurrence of certain conditions. The phrase “rights or options respecting stock” used in § 111(a)(2) has a specific meaning in Delaware statutory law, a meaning derived from 8 *Del. C.* § 157, which bears that phrase as its title. Section 157(a) is a specific grant of power:

Subject to any provisions in the certificate of incorporation, every corporation may create and issue, whether or not in connection with the issue and sale of any shares of stock or other securities of the corporation, rights or options entitling the holders thereof to acquire from the corporation any shares of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors.¹⁹

¹⁷ 8 *Del. C.* § 111(a)(2).

¹⁸ The parties have only cited one case applying 8 *Del. C.* § 111(a)(2), and that case found that there was jurisdiction where options to buy the underlying stock were involved. *See Cornerstone Brands, Inc. v. O’Steen*, 2006 WL 2788414, at *3 (Del. Ch. Sept. 20, 2006). Testa argues that *Lieberman v. Becker*, 155 A.2d 596 (Del. 1959), shows that this court has jurisdiction under § 111(a)(2). That case occurred before § 111 was amended to mention rights respecting stock and thus has no direct bearing on its interpretation. It also involved no holding about subject matter jurisdiction. Because the plaintiffs in that case apparently alleged that the directors breached their fiduciary duties in agreeing to the compensation plan in that action, jurisdiction existed under this court’s equitable powers over fiduciary duty claims. *See id.* at 601. Testa’s complaint does not allege a breach of fiduciary duty.

¹⁹ 8 *Del. C.* § 157(a).

By using the phrase “rights or options respecting its stock,” § 111(a)(2) gives this court jurisdiction over instruments exercising the power granted by § 157. That power is to issue securities and sell options or other rights entitling holders to acquire securities. And, while § 157 has been generously interpreted,²⁰ it does not concern entering into a contract that merely takes its value from stock, without actually giving any rights to purchase, sell, vote, or otherwise control the underlying stock. Instead, § 157 — and, by association, § 111 — is limited to the sale of stock and “rights or options entitling the holders thereof to acquire from the corporation any shares of its capital stock of any class or classes.” The Plan does not give Testa the right to purchase shares from Nixon. Accordingly, the Plan is not a “right or option respecting stock,” and § 111(a)(2) does not give this court jurisdiction over a claim for breach of the Plan. Having dealt with Testa’s major argument for the presence of subject matter jurisdiction, I turn to his other arguments, which have even less force.²¹

B. Testa’s Claims Do Not Vest Jurisdiction In This Court

Testa’s beef with the defendants is, at its core, a simple breach of contract claim. An award of monetary damages and interest in the Superior Court will make him entirely

²⁰ See, e.g., *Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1351 (Del. 1985) (holding that 8 *Del. C.* § 157 authorizes the issuance of a “poison pill” defense mechanism).

²¹ Testa also argues in his answering brief that a sale of substantially all of Nixon’s assets occurred. Testa Ans. Br. at 20-22. But, Testa did not allege in his complaint that a sale of substantially all of Nixon’s assets occurred. Accordingly, that issue is not properly before this court. And, even if it were, it would not create jurisdiction in this court. Section 271 of the DGCL, which governs sales of substantially all of the assets of a corporation, only protects voting stockholders. See *Winston v. Mandor*, 710 A.2d 835, 840 (Del. Ch. 1997) (denying a holder of non-voting preferred stock standing under 8 *Del. C.* § 271). Section 271 creates no rights for contracting parties, who must instead depend on their contractual rights at law.

whole. Testa strains to invoke this court's limited jurisdiction by proliferating claims and requests for equitable relief, but a "realistic assessment" of his complaint reveals no basis for equity's involvement.²² For starters, none of the claims Testa has advanced are equitable in nature and therefore do not vest jurisdiction in this court.²³

Nor does Testa plead a proper need for, or a right to, an equitable remedy. Testa feels that he was not paid what he was due under the Plan. If he is correct, the Superior Court can award him monetary damages that will make him whole. Although Testa has asked for a constructive trust, that request is insufficient to create jurisdiction in this case. A request for the imposition of a constructive trust will only invoke this court's equitable jurisdiction if there is "either an identifiable fund to which plaintiff claims equitable ownership . . . or the legal remedy will be inadequate for another reason — such as the distinctively equitable nature of the right asserted."²⁴ Here, there is no specific fund that Testa claims is rightfully his, the right he is asserting is fundamentally a legal one, and

²² See *McMahon v. New Castle Assocs.*, 532 A.2d 601, 603 (Del. Ch. 1987) ("Neither the artful use nor the wholesale invocation of familiar chancery terms in a complaint will itself excuse the court, upon a proper motion, from a realistic assessment of the nature of the wrong alleged and the remedy available in order to determine whether a legal remedy is available and fully adequate.").

²³ Estoppel, breach of contract, and negligence are all legal claims. Testa has also attempted to state a claim for unjust enrichment. But, that claim rests solely on the argument that Nixon was unjustly enriched when it paid less than it contractually owed under the Plan. Given that the Plan governs the parties' relations, that claim does not state a claim under Rule 12(b)(6) in any event. See *ID Biomedical Corp. v. TM Technologies, Inc.*, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995) (noting that a plaintiff cannot bring an unjust enrichment claim if the plaintiff's rights are governed by contract). And, as a matter of jurisdiction, it also fails because a remedy at law will be sufficient. The better view, which I embrace, is that a claim for unjust enrichment does not, in itself, invoke this court's jurisdiction. See *Crosse v. BCBSD, Inc.*, 836 A.2d 492, 496-97 (Del. 2003) (holding that an unjust enrichment claim did not create subject matter jurisdiction). Absent a need for an equitable remedy, an unjust enrichment claim should be presented in Superior Court. *Id.*

²⁴ *McMahon*, 532 A.2d at 608.

his legal remedies are entirely sufficient. The specific performance Testa seeks is also not necessary or appropriate because Testa simply seeks the cash he says he should have received under the Plan. No contractual claim could be more typically legal, not equitable.

In his complaint and answering brief, Testa also says he is seeking quasi-appraisal in the sense that he wants an independent valuation of Nixon's common stock under the Plan. Because Chancery cases have awarded a quasi-appraisal remedy in certain corporate cases, Testa says that there is equity jurisdiction here. But, Testa is seeking to conflate two very different contexts. Quasi-appraisal rights have been awarded to shareholders in fiduciary duty and other cases clearly implicating the Delaware General Corporate Law and thus falling within this court's core equitable and statutory jurisdiction.²⁵ In this case, the Superior Court has ample authority to require that Testa be paid the amount due under the Plan based on a valuation conducted in accordance with the Plan's terms. In other words, there is no need, or justification, for an equitable quasi-appraisal when all that Testa is entitled to are his contractual rights, whatever the Superior Court determines them to be. Likewise, Testa seeks an injunction barring further breaches of the Plan and violations of the Delaware Wage Payment and Collection Act. But, because Testa is a former employee who will receive complete

²⁵ See *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *32 (Del. Ch. Aug. 18, 2006) ("A quasi-appraisal remedy is appropriate for plaintiffs 'who may have been wrongfully deprived, even indirectly, of the statutory remedy of appraisal.'") (quoting *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 311 (Del. Ch. 2005)); 8 *Del. C.* § 262 (giving appraisal rights to *shareholders*). Testa is only asking that this court give him what he was owed under a contract and to have a proper contractual calculation made. That is a contract claim, pure and simple.

relief if he is awarded the contractual damages he seeks plus interest, and because the Superior Court can issue declaratory relief concerning these issues, Testa's request for an injunction is not sufficiently colorable to invoke this court's limited jurisdiction.²⁶

IV. Conclusion

In sum, this court does not have jurisdiction over Testa's claims and the defendants' motion to dismiss is granted. Although the defendants also make plausible arguments that most of the non-contractual claims Testa has asserted are without merit and should be dismissed under Rule 12(b)(6), those arguments should be addressed by the Superior Court.

The defendants' motion to dismiss for lack of subject matter jurisdiction is granted. This case will be dismissed unless Testa transfers this action to the Superior Court in accordance with 10 *Del. C.* § 1902 within 60 days.

IT IS SO ORDERED.

²⁶ A request for an injunction fails to create equitable jurisdiction as a matter of law unless there is a reasonable concern that the plaintiff will suffer future wrongdoing by the defendant. *See McMahon*, 532 A.2d at 606 (“At a minimum, for a complaint to properly state a claim cognizable in equity solely because of a request for an injunction, the facts alleged must, if assumed to be true, create a reasonable apprehension of a future wrong.”).