6-6-2008

Order on Programming Acquisitions' Motion to Dismiss (JAMES & JACKSON LLC)

Alice D. Bonner
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES & JACKSON LLC, individually and derivatively on behalf of MBC, GOSPEL NETWORK, LLC., Plaintiffs, v. EVANDER HOLYFIELD, JR., WILLIE E. GARY, CECIL FIELDER, LORENZO WILLIAMS, THOMAS WEIKSNAR, CHAN ABNEY, LORI METOYER-BROWN, and RICK NEWBERGER, Defendants.	Civil Action No.: 2006CV124372

ORDER ON PROGRAMMING ACQUISITIONS' MOTION TO DISMISS

The parties appeared telephonically before the Court on May 22, 2008, to present oral argument on the Motion to Dismiss of Defendant Programming Acquisitions, LLC ("Programming"). After reviewing the record of the case, the arguments of counsel, and the briefs submitted on the motion, the Court finds as follows:

FACTS:

This case involves a dispute arising from an April 2006, cash-out merger of MBC Gospel Network, LLC ("MBC"), a Delaware limited liability company, into Programming, also a Delaware limited liability company.

Plaintiff James and Jackson LLC ("J&J") was a founding member and twenty percent (20%) member of MBC. Willie Gary, LLC ("WGLLC") was the controlling, and only other member of MBC, with eighty percent (80%).

In 2005, WGLLC filed suit in Delaware Chancery Court to compel J&J's consent to the addition of a third member, or, in the alternative, to dissolve MBC. Chancellor Strine found

that the MBC Operating Agreement did not condition the withholding of consent on reasonableness, and thus, the Delaware Court could not compel J&J's consent. Thereafter, the parties discussed dissolution of MBC. WGLLC, however, withdrew the petition prior to a final order or other action in the case.

Around this time period, WGLLC and several individuals, including the individually-named Defendants, formed Programming, the entity into which MBC would soon merge. WGLLC has twenty-three members including Defendants Evander Holyfield, Jr., Willie E. Gary, Cecil Fielder, Lorenzo Williams, Chan Abney, and Lori Metoyer-Brown, all of whom were on the management board of MBC and all of whom are owners in Programming. In addition, Defendant Rick Newberger was the CEO of MBC and is an owner of Programming; and Defendant Thomas Weiksnar was on the management board of MBC and is also an owner in Programming. On April 26, 2006, Programming and MBC finalized a $1 cash-out merger.

Plaintiff complains that the merger was a self-interested transaction and raises several direct and derivative claims of breach of fiduciary duty, aiding and abetting, and conspiracy of breach of fiduciary duty.

The Court ruled on similar issues in its October 10, 2007 Order on Defendants' Motion to Dismiss (the "MTD Order"), which was decided before Programming was added as a party. Thus, the Court shall revisit these difficult issues.

PERSONAL JURISDICTION:

The first issue before this Court is whether Programming has sufficient contacts with Georgia in order to justify this Court's exercise of jurisdiction over it.

A court may exercise personal jurisdiction over a nonresident defendant if there is sufficient basis under the forum's long arm jurisdiction statute and the nonresident defendant's actions demonstrate minimum contacts sufficient to meet the due process considerations found in the U.S. Constitution. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Georgia's long arm jurisdiction statute establishes personal jurisdiction over a nonresident who commits a tortious act or omission, causes an injury, or "transacts any business" in this state. O.C.G.A. § 9-10-91.[1]

The scope of Georgia's long arm statute with respect to the "transacts any business" prong is coterminous with the limits of due process. Innovative Clinical & Consulting Serv., LLC, v. First Nat'l Bank of Ames, Iowa, 279 Ga. 672 (2005) remanded to 280 Ga. App. 337 (2006). "The constitutional touchstone is whether the defendant purposefully established minimum contacts in the forum State, that is, whether the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." Home Depot Supply, Inc., v. Hunter Management, LLC., 289 Ga. App. 286, 289 (2008).

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[1] O.C.G.A. § 9-10-91

A court of this state may exercise personal jurisdiction over any nonresident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

(1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(4) Owns, uses, or possesses any real property situated within this state; or

(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

In evaluating the Constitutional considerations of personal jurisdiction based upon "transacts any business," the Court applies a three-part test: (1) whether or not the defendant purposefully consummated a transaction or did an act within this state; (2) whether the cause of action arises from such act or transactions; and (3) whether the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. Aero Toy Store, LLC v. Grieves, 279 Ga. App. 515, 517 (2006). The first two prongs of the Aero Toy test establish "minimum contacts" and the third factor evaluates the reasonableness of asserting jurisdiction. Id. Such reasonableness factors include "the burden on defendant, the forum state's interest in adjudicating the dispute, plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution to controversies, and the shared interest of the states in furthering substantive social policies." Id. at 518.

A defendant who moves a court to dismiss for lack of personal jurisdiction bears the burden of proving the court's lack of jurisdiction. Beasley v. Beasley, 260 Ga. 419, 420 (1990). In evaluating a motion to dismiss, a trial court construes the uncontroverted complaint allegations as true; where evidence is offered, it is viewed in the light most favorable to the plaintiff. Delong Equip. Co. v. Wash. Mills Abrasive Co., 840 F.2d 843, 845 (11th Cir. 1988).

Programming, a Delaware limited liability company, filed a certificate of authority to do business in Georgia days after the MBC merger closed. In addition, Programming assumed and operated out of MBC's headquarters located in Atlanta, Georgia. Defendants point out that these "contacts" took place after the merger closed and thus have no connection with nor did they give rise to Plaintiff's cause of action. That argument, however, overlooks that

Programming was engaged in merger negotiations with MBC prior to the close of the deal. While the merger may be have been negotiated and closed in Delaware, as Defendants claim, the negotiations concerned property and other tangible and intangible assets located in Georgia. Surely this state has an interest in and authority over a suit against a non-resident who contracts to buy assets in Georgia, buys those assets, and ultimately operates those assets in the State, especially where the plaintiff's complaint challenges the underlying transaction conveying those assets. Additionally, the Court finds no grave inconvenience to Programming, who has several members living in or near this jurisdiction, to defend this suit in Georgia.

In accordance with the foregoing analysis, the Court finds that Programming has sufficient contacts with Georgia in order for this Court to exercise personal jurisdiction over it; therefore, Programming's Motion to Dismiss is hereby **DENIED** on this issue.

VENUE:

Pursuant to O.C.G.A. § 9-10-93, venue is proper in the county "wherein a substantial part of the business was transacted." In addition, "[w]here an action is brought against a resident of this state, any nonresident of this state who is involved in the same transaction or occurrence ... may be joined as a defendant in the county where a resident defendant is suable." Id.

Here, Programming assumed and operated out of MBC's former headquarters in Fulton County. Additionally, Ms. Metoyer-Brown is a resident of Fulton County. Thus, venue in Fulton County is proper and Programming's Motion to Dismiss is hereby **DENIED** on this issue.

FAILURE TO STATE A CLAIM:

A party seeking a motion to dismiss brought under OCGA § 9-11-12(b)(6) for failure to state a claim upon which relief can be granted must demonstrate that plaintiff's allegations in the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof. Common Cause/Georgia v. City of Atlanta, 279 Ga. 480, 481 (2005). The internal affairs of a corporation, such as actions involving officers and directions, shall be regulated by the law of the state of incorporation. Diedrich v. Miller & Meier & Assoc., Architects & Planners, Inc., 254 Ga. 734, 735 (1985).

A. Direct Claims

Defendants argue that J&J suffered no direct harm as a result of the merger and has no standing to bring direct claims. WGLLC was the controlling member of MBC. See In re PNB Holding Co. Shareholders Litigation, 2006 WL 2403999, at *9 (Del. Ch. Ct. 2006) (citing the "well established test for a controlling shareholder under Delaware law... (1) owns more than 50% of the voting power of a corporation; or (2) exercised control over the business and affairs of the corporation."). In cases with a controlling shareholder, the Delaware Courts have allowed direct actions to proceed where the minority shareholder has been disproportionately injured. See, Rhodes v. Silkroad Equity LLC, 2007 WL 2058736 (Del. Ch., July 11, 2007) (recognizing the ability of certain claims to be both derivative and direct where the injury falls disproportionately upon the minority shareholder); Gentile v. Rossette, 906 A. 2d 91 (Del. 2006) (allowing direct claims where the majority shareholder transferred economic and voting power away from the minority shareholder); Feldman v. Cutaia, 2007 WL 2215956 (Del. Ch. 2007) (allowing direct claims to proceed against a majority shareholder who exercised control over the corporation and who diluted the minority

shareholder's interest in the corporation). In the instant case, the controlling member (WGLLC) of MBC entered into a transaction with another company (Programming) that it owned and negotiated a cash-out merger (of MBC into Programming). The merger resulted in an exchange of stock in the new company and the extinguishment of MBC debt, which was held by WGLLC,[2] in exchange for $1 for MBC. Like the plaintiffs in Rhodes, Gentile and Feldmen, J&J claims that the merger improperly deprived them of their interest in MBC.

In accordance with the above-stated reasoning and the reasoning stated in the previous MTD Order, the Court hereby finds that J&J has standing to bring direct claims against Programming and **DENIES** Programming's Motion to Dismiss on this issue.

B. Appraisal vs. Equitable Remedies

Second, Programming argues that J&J's sole remedy post-merger is for an appraisal of the fair market value of the shares (i.e., a review of whether or not $1 was a fair price).

In Nagy v. Bistricer, 770 A.2d 43 (2000), the former minority shareholder in a merged corporation brought suit against the controlling shareholders and the surviving corporation. In Nagy, defendants Bistricer and Stein were the controlling shareholders of the merged company and the surviving company. They negotiated and signed the merger agreement which extinguished Nagy's interest. Nagy sought an appraisal action, in addition to claiming breached of fiduciary duties and aiding and abetting such breaches. Id. at 48-49. The Delaware Chancery Court was faced with the question of whether Nagy could bring both equitable (breach of fiduciary duty) and appraisal claims. Vice Chancellor Strine reasoned that fiduciary duty claims raised issues "unrelated to valuation" where the merger was an

[2] J&J alleges that WGLLC was obligated to satisfy all future capital calls to MBC under the terms of the Operating Agreement, but that WGLLC improperly characterized these contributions as "loans". Thus, WGLLC was able to recoup some of its investment in MBC as an unsecured creditor and receive a stake in the surviving company , whereas J&J received its 20% share of $1.00.

allegedly self-dealing transaction that benefited the controlling shareholders at the expense of the minority. Id. at 51. Additionally Vice Chancellor Strine contrasted the narrow statutory appraisal remedy with the broad remedy available in a "fraud action asserting fair dealing and fair price claims," which include "in its relief any damages sustained by the shareholders." Id. at 52. Where plaintiffs "have alleged that individual defendants stood on both sides of the cash out merger...and failed to provide any method for determining whether the merger was entirely fair to the shareholders independent of the defendants themselves...[and] claim that the resulting price was unfair ....[the complaint] states a claim sufficient to survive a motion to dismiss...." Id. at 53, citing Wood v. Franke E. Best, Inc., Del. Ch., mem. op., 1999 WL 504779.

The Nagy case is analogous this case. This Court finds, consistent with Delaware Law, that where the plaintiff has sufficiently alleged a breach of fiduciary duty, such as with an interested-director transaction, the plaintiff may pursue equitable remedies available for fraud. For the foregoing reasons, the Court hereby **DENIES** Programming's Motion to Dismiss on this issue.

C. Derivative Claims

Finally, Programming urges this Court to find that Plaintiff has no standing to bring a derivative suit. The effect of a merger is typically to deprive the shareholder of the merged company standing to bring derivative suits. Lewis v. Ward, 852 A.2d 896, 899 (Del. 2004); see also, Lewis v. Anderson, 477 A.2d 1040 (Del. 1984). There are narrow exceptions to this rule as discussed in the previous MTD Order, where fraud is alleged or where the merger is merely a reorganization. See Lewis v. Ward, 852 A.2d 896 (Del. 2004); Kramer v. Western

Pacific Industries, Inc., 546 A.2d 348, 354 (Del. 1988); Lewis v. Anderson, 477 A.2d 1040 (De. 1984).

Under a broad reading of "fraud" to mean a self-dealing transaction or a strategic maneuver to abrogate a judicial process, this Court found in its previous MTD Order that Plaintiff pled sufficient facts to survive the earlier motion to dismiss and bring derivative claims. See, e.g., Feldman v. Cutaia, 2007 WL 2215956, at *11 (Del. Ch. 2007) (reasoning that the fraud exception extended to transactions motivated by the "pendency" of a case or allegations of a "fraudulent" merger). Thus, the merger has not extinguished Plaintiff's general right to bring derivative claims in this case.

However, Programming, as the surviving company, owns whatever derivative claims Plaintiff may raise on MBC's behalf. This anomalous situation of a "corporation suing itself for its own benefit" is one that Delaware courts have rendered moot. Bokat v. Getty Oil Company, 262 A.2d 246, 249 (1970) ("The action against Getty Oil has therefore been made moot by the merger, for if this were not so, the anomalous situation of a corporation suing itself for its own benefit would be presented."). Thus, Plaintiff's derivative claims may not proceed against Programming, although Plaintiffs' claims against the individual directors may. Id. ("This conclusion, however, does not mean that the [derivative] claims asserted against the individual defendants...have likewise been made moot."). Accordingly, Programming's Motion to Dismiss Plaintiffs' derivative claims is hereby **GRANTED**.

SO ORDERED this 6th day of June, 2008.

Allen D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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