



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEF and GHI,)
)
)
Non-Parties Below,) No. 545, 2013
Appellants,)
)
v.) On appeal from C.A. No. 8601-VCL
) in the Court of Chancery of
) the State of Delaware
STATE OF DELAWARE <i>ex rel.</i>)
THE HONORABLE KAREN WELDIN)
STEWART, CIR-ML, Insurance)
Commissioner of the State of Delaware)
)
Petitioner-Below, Appellee,)
)
-and-)
)
XYZ,)
)
)
Respondent-Below,)
Appellee.)

APPELLANTS' REPLY BRIEF

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Appellants¹ DEF and GHI respectfully submit this Reply Brief in further support of their appeal of the Trial Court’s Amended Seizure Order, Sanctions Order, and Rehearing Denial (the “Appealed Orders”). For the reasons stated herein as well as in their Opening Brief, DEF and GHI maintain that the Trial Court erred and that the Appealed Orders should be reversed.²

I. Appellants’ Have Just Learned that A Secret Hearing with the Court Occurred on Sept. 10, 2013.

On Jan. 2, 2014, the Trial Court issued a Memorandum Opinion on a separate issue involving DEF. In the course of its summary of the events underlying this action, much to Appellants’ surprise, the Trial Court describes an emergency hearing that occurred before the Trial Court on Sept. 10, 2013, regarding allegations that DEF was “interfering actively with [XYZ] and the efforts of the Commissioner” (AR105). At first glance, the mention of the hearing in the Memorandum Opinion appeared to be a mistake regarding the restatement of the record. No notice of any hearing appeared on the Trial Court’s docket.

However, as undersigned counsel began to review more closely, it appeared that a hearing had occurred on Sept. 10. In the Jan. 2 Memorandum Opinion, the

¹ Capitalized terms not otherwise herein defined shall have the same meanings ascribed to them in Appellants’ Opening Brief. References to “AR” refer to the Appendix to Appellants’ Reply Brief.

² The Trial Court has now unsealed most of the docket in this matter, and this brief is being publicly filed. Appellants believe that the use of pseudonyms is no longer necessary and will be filing a motion to vacate this Court’s order. However, until the Court so orders, Appellants will be using the pseudonyms delineated in the Court’s Oct. 10, 2013, Order (Supr. Ct. Dkt. 5), and as used by the parties in the prior appeal briefing.

Trial Court notes that the hearing was held the day after the expedited Motion to Amend the Seizure Order was filed. *See* AR105 (“On September 9, 2013, [XYZ] sought an expedited modification of the Seizure Order on the grounds that [DEF] was interfering actively with [XYZ] and the efforts of the Commissioner. Due to the summary nature of an insurance liquidation and the exigent nature of the motion, the court heard the motion the following day.”). The Trial Court stated, “Counsel for both [XYZ] and the Commissioner participated in the hearing, and they provided documentary evidence and presented testimony by affidavit. The affiants were present and available to testify, but the court dispensed with live testimony in the interest of time” (*id.*).

Undersigned counsel was not involved in this matter on Sept. 10, 2013. Upon further investigation in the course of writing this Reply Brief, undersigned counsel reached out to Appellants’ prior counsel, David Wilks, Esq. and Alex Brown, Esq., to confirm whether they had any knowledge of a Sept. 10 hearing. The hearing came as news to them. Thereafter, an email was sent to opposing counsel questioning them about the hearing. **Only then**, on Jan. 15, 2014, did the Commissioner’s counsel forward a copy of a transcript from a Sept. 10, 2013, hearing attended not only by XYZ’s counsel but by the Commissioner’s counsel. *See* AR61.

This hearing comes as a **total shock** to Appellants and their counsel. Neither Appellants nor Appellants’ counsel had any knowledge that this hearing occurred.

Furthermore, nothing was entered on the docket regarding this hearing. Appellants had no reason even to suspect that a hearing had occurred until the Memorandum Opinion was issued on Jan. 2, 2014.

At this Sept. 10 hearing, the Trial Court heard unsworn testimony from an XYZ employee and allegations from XYZ's counsel that:

- DEF had access to XYZ's IT system and was monitoring the email accounts of various officers and employees;
- DEF disparaged interim management by email; and
- DEF forwarded a copy of a confidential Maryland seizure order to AM Best, a rating agency covering XYZ, using someone else email.

(AR106). The one-sided allegations raised during the hearing became the basis for the entry of the Amended Seizure Order, and from there, a flood of sanctions motions and increasingly more severe sanctions against DEF. *See id.* (“After holding the emergency hearing and considering the evidence presented, the court amended the Seizure Order to clarify that [DEF] was prohibited from accessing [XYZ]’s IT systems and from communicating with [XYZ]’s employees and business associates.”).

The hearing—held in Chambers before a court reporter—was not noticed, even though the identity of DEF’s counsel was well known to opposing counsel and the Trial Court. In fact, three weeks earlier, the Trial Court had heard a motion to intervene brought by DEF’s wholly-owned Delaware LLC, RB Entertainment, and specifically ruled that DEF would be given access to documents filed in the

proceeding. *See* B565-66. Regardless, the Trial Court, after hearing the complaints of the XYZ witnesses at the Sept. 10 hearing, by and large concluded, stating:

THE COURT: What I'd ask you-all to do is to secure a copy of this transcript from Ms. Ecker [the Court Reporter] and provide it to Mr. Wilks [Appellants' counsel] so that he's clear what his obligations are.

(AR77 [17:2-5]). Inexplicably, this did not happen. Not one of the seven lawyers present in the hearing ever told Appellants' counsel that the hearing occurred.

There is simply no excuse for why DEF or his counsel were not notified about the hearing: the entire hearing related to allegations of misconduct by DEF. DEF did not have an opportunity to hear the testimony, to cross examine witnesses, to present his version of the facts, or to present argument. Three witnesses from XYZ's Baltimore office were in attendance at the Sept. 10 hearing, and the Commissioner's Delaware and out-of-state counsel were also in attendance. However, nobody representing DEF was invited to or present at the hearing.

XYZ and the Commissioner had free rein to "poison the well." There can be no doubt that what occurred at this hearing helped to set the tone for the upcoming campaign of sanctions motions that followed. During the hearing, XYZ's counsel stated:

And then the final thing that we've addressed in the -- in the motion is the fact that somebody -- and we believe its [DEF] -- hijacked an e-mail alias and sent one of the confidential filings, actually from the Maryland action, and sent that to AM Best just prior to the point in time when Mr. Koehler and one of our board members, Pav Oliva, arrived at AM Best.

Now, at this point we don't have a smoking gun in [DEF's] hands, but we believe in time we will find that. But we can't imagine anybody else who would have done that.

(AR65 [5:4-15]). The Transcript reflects that counsel for XYZ examined an XYZ employee about the substance of the Motion to Amend the Seizure Order, handed evidence to the Trial Court to review (AR67), and discussed the effects of the proposed order with the Trial Court to determine the best means of protecting XYZ (AR70-71). Moreover, the Commissioner's counsel was permitted to provide comments as well. The Commissioner's counsel, stated, "Your Honor, we agree with the relief" (AR72 [12:1-2]). The Trial Court thereafter issued its ruling: "Okay. Here's what I'm going to do then. I am going to grant the order" (AR72 [12:3-4]).

Without any provoking by either XYZ or the State on the issue, the Trial Court also determined that DEF's alleged actions were "also potentially criminal conduct" (AR74 [14:24-15:1]). The Trial Court stated:

I have had the benefit lately of getting an education in some of our state and federal statutes on point. And the conduct in which [DEF] has engaged or is alleged to have engaged -- and there's a plausible basis for believing he's engaged -- would, at least on its face, appear to violate both the Federal Stored Communications Act, which is found at 18 U.S.C. Section 2701(a), as well as Delaware's analogous state statute found at 11 Del. Code Sections 2421 through 2427.

Both of those statutes make it a crime for a person to intentionally access without authorization a facility through which an electronic communication service is provided. It also makes it a crime to intentionally exceed an authorization to access that facility and thereby

obtain access to wire or electronic communications while it's in electronic storage on such a system.

There are ample cases supporting the idea that unauthorized access to a corporate e-mail system is, in fact, chargeable conduct under the Federal Stored Communication Act as well as the state analogs.

(AR75 [15:1-23]).

Given the fact that the Trial Court expected that the transcript from the Sept. 10 hearing would be given to Appellants' counsel, the Court's irritation with DEF not appearing at the Sept. 24 hearing now has a great deal more context for DEF and his counsel. The Trial Court noted at the Sept. 24 hearing:

THE COURT: I was sort of expecting to see him here today. Why did he decide not to come to testify and rebut some of these issues that have been raised?

To which DEF's counsel replied:

MR. WILKS: Well, Your Honor, a couple reasons. One, we did submit his affidavit, which we think squarely addressed and rebutted all the accusations against him. More importantly, Your Honor, it's not his burden. It's the movant's burden to come forward with evidence that shows that they are entitled to the sanction that they seek.

(A752-3 [3:24-4:10]). Obviously, this response, following on the heels of the Sept. 10 hearing where the Trial Court was considering DEF's conduct as potentially criminal in nature, was the completely wrong response. Yet, Mr. Wilks as DEF's counsel had no knowledge what had occurred two weeks earlier.

This does not satisfy due process. This Court has held, “The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled.” *Perrine v. Pennroad Corp.*, 47 A.2d 479, 486 (Del. 1946). That said, “[d]ue process in judicial proceedings implies action in conformity with the general law, based upon evidence, and after a full hearing upon notice to the party or parties affected and an opportunity to be heard.” *Aprile v. State*, 143 A.2d 739, 744 (Del. Super. 1958). Moreover, “[a]ppropriate notice of the time, location and nature of the proceeding is a fundamental right which is an inherent part of due process of law.” *Louis K. v. Vicki K.*, 1985 Del. Super. LEXIS 1150, at *3 (Del. Super. Apr. 30, 1985).

Here, the hearing in Chambers was an irregular, *ex parte* proceeding. However, the problem with the hearing was made far worse by the lawyers’ failure to share the transcript with Appellants’ counsel. The Trial Court erred.

II. The Commissioner Cannot Use Fraud Allegations to Justify Violations of Due Process.

Throughout this proceeding, the Commissioner has justified her actions by repeating that fraud has been alleged. The Commissioner has used these allegations of fraud as the license for her: (1) to seize XYZ, a once profitable company on an *ex parte* basis (Answering Brief [“Ans. Br.”] at 5); (2) to advance a petition liquidating XYZ, despite a Grant Thornton report showing a very solvent and profitable company (*id.* at 5-6); and (3) now to justify why the proceedings in the Trial Court do not contravene Due Process and why DEF and GHI are not entitled to their requested relief in this appeal. *See id.* at 10 (stating that “[n]either XYZ nor DEF has submitted any denial of the detailed and verified evidence of pervasive fraudulent conduct that are part of the record.”).

Even though these allegations of fraud are repeatedly bandied about by the Commissioner, these allegations remain just that: **allegations**. Twice now, DEF through his wholly-owned Delaware LLC, RB Entertainment, has sought to intervene. First, RB Entertainment, which holds 99 percent of XYZ’s equity, attempted to intervene in these proceedings following the filing of the Liquidation Petition by the Commissioner in August 2013. The Trial Court denied the motion (A97).³ RB Entertainment sought leave to intervene again in November 2013

³ The Trial Court denied RB Entertainment’s motion to intervene following an Aug. 22, 2013, hearing without prejudice to renew the motion (B526), stating:

following the filing of a petition to convert to a rehabilitation proceeding. This time, the Trial Court did not even permit a motion to be filed. DEF and his affiliated entities have been held in procedural limbo as non-parties to these proceedings—procedurally unable to challenge the Commissioner’s fraud allegations or present evidence to oppose the Commissioner’s allegations regarding the solvency of XYZ. Much to his frustration, DEF has been forced to remain on the sidelines and watch while the Commissioner and her for-profit contractor⁴ have destroyed the company he built from scratch.

At bottom, neither Appellants, nor anyone affiliated with the Appellants have been charged, tried, or, much less, convicted, and any effort by DEF to challenge this control has been deemed “interference” by the Commissioner and her agents, subjecting DEF to sanctions.

If it turns out that the State wants some remedy that would deprive RB Enterprises of its voting rights or otherwise affect its unique rights as a stockholder, I would reconsider and I would give [DEF], or really RB [Entertainment], the ability to intervene for the purpose of litigating its own particular rights.

Likewise, I think that if the issue of fraud is to be adjudicated on the 9th and 10th [the then-scheduled hearing on the Liquidation Petition] and if that adjudication would then, in turn, be binding upon RB, then I would allow RB to intervene solely for the purpose of defending against an adjudication that could be dispositive of its rights.

(B563 [38:7-18]). The Trial Court has denied a subsequent request to intervene which is the subject of the appeal in Case No. 621, 2013.

⁴ The Commissioner has delegated certain of her key regulatory responsibilities to a for-profit contractor based in Philadelphia, INS Regulatory Insurance Services. DEF has asserted that this delegation of regulatory authority violates 18 *Del. C.* § 308, which prohibits the use of an examiner who might otherwise have a financial gain.

III. The Trial Court Entered the Amended Seizure Order Without Any Opportunity to Respond.

In the Commissioner's Answering Brief, the Commissioner describes Appellants' argument that the Amended Seizure Order effectively shuttered several of Appellants' businesses as "devoid of further explanation or citation to the Record" (Ans. Br. at 15). The Commissioner, however, has missed the point of Appellants' argument: Appellants never had the opportunity to make a record because the Trial Court 1) held an *ex parte* hearing in which one sided testimony was presented and 2) entered the Amended Seizure Order **less than one day** after XYZ's counsel filed its Motion to Amend the Seizure Order, and **less than two hours** after Appellants' counsel requested an opportunity to present an opposition to the motion. *See* Opening Br. at 13-14 (citing letter at A307). Appellants tried to present after-the-fact argument on the Amended Seizure Order on Sept. 19 (A327), but as XYZ acknowledged in opposition briefing, the Amended Seizure Order "does not contain any provision permitting [DEF] or [GHI] to reopen the matter and argue the merits of the Amended [Seizure] Order" (A585 at ¶ 1).

Next, citing the non-legally-binding title on the cover of the hearing transcript (Ans. Br. at 17),⁵ the Commissioner argues that the Sept. 24, 2013, hearing was a hearing on the Motion to Amend the Seizure Order. This carries no weight: In the

⁵ Nothing in the Court of Chancery Rules suggests that a cover page to a court transcript carries any legal weight.

body of the transcript—which is the memorialization of the Trial Court’s proceedings—the Trial Court makes no statement that it was in any way reconsidering or modifying the Amended Seizure Order. In fact, the Trial Court stated at the close of the Sept. 24 hearing, “We’re here today so that I could hear the merits of an expedited motion for sanctions” (A1104 [165:6-7]). Moreover, the Trial Court, in its consideration of whether to sanction DEF, weighed the evidence presented at the Sept. 24 hearing against both the Seizure Order and the Amended Seizure Order. *See* A1104 [165:20-24]. Contrary to the arguments made by the Commissioner, the hearing on Sept. 24 did not serve as any procedural due process check. By Sept. 24, the Amended Seizure Order was a standing order.

Citing 18 *Del. C.* § 5943(b) which provides, among other things, that “[a]n order of the Court pursuant to a formal proceeding under this subchapter shall ipso facto vacate the seizure order,” the Commissioner argues that the appeal of the Amended Seizure Order should be deemed “moot” (Ans. Br. at 19). “The doctrine of mootness counsels that a court should dismiss pending litigation if the allegedly threatened injury no longer exists. Thus, a court generally will not grant relief if the substance of a dispute disappears due to the occurrence of certain events following the filing of an action.” *Multi-Fineline Electronix v. WBL Corp.*, 2007 Del. Ch. LEXIS 21, at *26(Del. Ch. Feb. 2, 2007).

Contrary to the Commissioner’s argument, however, the substance of the dispute has not disappeared. The Amended Seizure Order served as the basis for a sanctions ruling on November 1 (which is the subject of the appeal in Case No. 621, 2013) leading to a forfeiture of a \$100,000 deposit by DEF with the Register in Chancery. *See* AR86 at ¶ 4.⁶ Furthermore, in a November 8, 2013, Order to Show Cause, issued by the Trial Court the day after the Trial Court entered the Rehabilitation and Injunction Order (the “Rehabilitation Order”), the Trial Court specifically stated that it was considering whether the Seizure Order had been violated. *See* AR92 at ¶¶ 5 & 7. Regardless of what the Commissioner argues that the statute says, the Trial Court has obviously not deemed its prior orders “vacated,” whether ipso facto or otherwise, by the entry of the Rehabilitation Order. The Commissioner’s argument must be rejected.

⁶ The forfeiture of the \$100,000 deposit is the subject of the appeal in Case No. 621, 2013. However, it bears noting that the 18 *Del. C.* § 5941(f) limits violations of orders issued in delinquency proceedings to \$10,000. DEF has consistently faced substantially greater penalties. The General Assembly appears to have limited these fines.

IV. The Trial Court Reversed the Presumption of Corporate Separateness When It Decided to Extend the Seizure Order Over GHI.

Appellants assert that it was a violation of Due Process when the Trial Court determined *sua sponte* to extend the Commissioner's seizure over GHI, a non-regulated entity, and prohibited DEF from exercising control over GHI. The Answering Brief counters that DEF had an opportunity to be heard but made a conscious decision not to attend. XYZ further asserts that the issue is moot.

In the Amended Seizure Order, the Trial Court ordered DEF to "show cause on or before Sept. 24, 2013, why by accessing Respondent's information and technology systems he is not in contempt of paragraphs 7 and 9 of the Seizure Order" (Exhibit A to Opening Br. at ¶ 5). The Trial Court modified this show-cause provision in a subsequent Sept. 13 Order Setting Hearing on Motion for Sanctions and Order to Show Cause (A326). Neither of these orders gave notice that DEF would be placed in jeopardy of losing control over GHI or that DEF (or his counsel) would be required to specifically detail the differences between the at-least 17 different entities affiliated with DEF. Yet, when XYZ's counsel did not arrive in the courtroom on time for the show cause hearing (*see* A752-54), the Trial Court focused its attention on the specifics of DEF's other businesses.

The Trial Court identified the importance of corporate separateness under Delaware law, plainly stating: "Delaware is as big as any state. I would put us No. 1 in terms of respect for corporate separateness. It's like, you know, God, apple pie,

and Mom to us” (A775 [26:13-16]). Unfortunately, the Trial Court’s ruling—requiring DEF to prove the separateness of the various affiliated entities—turned the standard for corporate separateness on its head. The Trial Court stated:

Finally, there’s sufficient evidence of a close interrelationship between [GHI] and [XYZ] that at this point I believe it’s necessary to preserve the status quo to extend the seizure order and to enjoin [DEF] from taking any action to interfere with the company through [GHI].

[DEF] requested basically the opposite relief; namely, that he’d be allowed full access to [GHI] and all of its assets so long as the company, [XYZ], continued to have access to its information. I’m denying that request, and I am doing exactly the opposite.

(A919 [170:2-13]). The Trial Court, however, did not specify what “evidence” it was referring to when it extended the Commissioner’s regulatory authority over GHI—and then required DEF to fund the discovery to prove that GHI is separate and apart from XYZ. *See* A916 at 167:3-15.⁷

The Trial Court specifically questioned Appellants’ counsel about, among other things, the number of employees, number of shared employees, revenue totals, ownership of entities, and so on. *See* A753-773. The fact remains that the lawyers who were in attendance at the hearing, despite their cordial eagerness to respond to the Trial Court’s questions (*see* A753 at [4:11-15]), could not fully provide detailed

⁷ The Commissioner argues that DEF “waived” its argument that the Trial Court erred by ordering DEF to fund the discovery costs, even though DEF raised this in a separate paragraph as part of its *Eldridge* analysis. To the degree that the Court agrees that the Trial Court improperly reversed the presumption of corporate separateness, having DEF, an individual, pay for XYZ’s effort to divest him of ownership is both punitive and a reversal of the standard “American Rule” related to payment of counsel.

answers to specific questions regarding the 17 different entities. Even if DEF had been in attendance⁸ at the Sept. 24 hearing, it would have been extremely difficult to precisely answer the Trial Court’s questions regarding corporate separateness without some advance preparation. Moreover, many, if not all, of the documents needed to present proper evidence are located at the offices located at 950 Ridgebrook—the offices utilized by XYZ. Because the Commissioner had specifically banned DEF from these offices, DEF could not access these records.

The Commissioner responds that the issue of corporate separateness should have come as no surprise since the fact that there were other entities operating out of the same offices shared by XYZ was raised as a defense to the claim that there had been intentional interference with the Commissioner’s control by DEF (Ans Br. at 21-22). Undoubtedly, the affidavit prepared by DEF made clear that DEF had not, among other things, accessed XYZ’s computer servers because the servers were not XYZ’s to begin with. *See* A512 at ¶ 4 (specifying that servers had been purchased by GHI).⁹ The offices at 950 Ridgebrook were not leased to XYZ, but

⁸ Though opposing counsel has made much of the fact that DEF did not attend the Sept. 24 hearing, DEF’s counsel had no knowledge of what the Trial Court had already determined at the Sept. 10 hearing and believed that DEF’s attendance at the Sept. 24 hearing was unnecessary. Since the Sept. 24 hearing, DEF has appeared at every hearing in this matter.

⁹ The Commissioner writes, “DEF’s Response to the Order to Show Cause included an affidavit from DEF in which DEF did not deny accessing XYZ’s information and technology systems, but argued instead that the servers housing XYZ’s information and technology systems were owned by GHI” (Ans. Br. at 9). The servers do not belong to XYZ, a point that DEF tried to convey by providing specifics as to when the servers were purchased, how much the servers cost, and who owned them. *See* A512 at ¶ 4.

instead to The Agency, LLC. Yet, Appellants maintain that there is a big difference between being prepared to argue a defense versus having a court strip such person of property rights simply for raising such defense.

Appellants' raising of this defense subjected DEF's counsel to summary hearing on corporate separateness by the Trial Court. In doing so, the Trial Court reversed the presumption that Delaware corporate entities are separate until proven otherwise—in short, that there is a veil between corporate entities that must be pierced to issue the order that ultimately was issued by the Trial Court. *See Roseton OL, LLC v. Dynegy Holdings, Inc.*, 2011 Del. Ch. LEXIS 113, at *62 (Del. Ch. July 29, 2011) (quoting *In re Regency Hldgs. (Cayman), Inc.*, 216 B.R. 371, 375 (Bankr. S.D.N.Y. 1998), for proposition that “[a] party seeking to overcome the presumption of separateness must pierce the corporate veil, or prove that the two entities should be substantively consolidated.”). *See also Midland Interiors, Inc. v. Burleigh*, 2006 Del. Ch. LEXIS 220, at *9-10 (Del. Ch. Dec. 19, 2006) (“Absent compelling cause, a court will not disregard the corporate form or otherwise disturb the legal attributes such as limited liability, of a corporation. ... [O]ur courts have only been persuaded to ‘pierce the corporate veil’ after substantial consideration of the shareholder owner’s disregard of the separate corporate fiction and the degree of injustice impressed on the litigants by recognition of the corporate entity.”).

Here, DEF was required to prove separateness in order to justify his control. The Trial Court’s Sanctions Order specifically divested DEF of control of GHI, reversing the presumption of separateness. Despite the Trial Court’s statement that evidence had been “sufficient” to show a “close interrelationship,” neither the Commissioner nor XYZ presented any significant evidence on the issue. XYZ’s counsel—who filed the expedited motions for sanctions—focused their client’s testimony not on corporate separateness but on the alleged interference: Counsel for XYZ stated, “[W]e have a number of witnesses that we’d like to put on, but their testimony is specific to the instances that we feel constitute contempt” (A789 [40:13-16]). XYZ did, on a conclusory basis, dispute ownership of the assets and made broad statements that GHI did nothing. *See* A787 [38:4-9]; A788-89 [39:17-40:5].

Finally, the Commissioner argues that the appeal of the Sanctions Order is moot because, again, the Trial Court’s entry of the Rehabilitation Order has vacated the Seizure Order, and any orders stemming from the Seizure Order. If the Court so determines, DEF is prepared to accept that it has control again over GHI.

V. The Trial Court Abused Its Discretion When It Failed to Reconsider Its Prior Ruling or to Hear New Evidence.

DEF and GHI argued that it was an abuse of discretion when the Trial Court failed to reconsider its Sanctions Order in the face of new evidence. Less than one hour after the motion for relief was filed, the Trial Court denied DEF's motion, effectively shutting the door to the court. The Commissioner responds that "DEF and GHI do not quarrel with, *or even acknowledge*, the Trial Court's determination that the motion was insufficiently specific" (Ans. Br. at 32). Appellants dispute this. Regardless, even if this were true, this was precisely the same problem that DEF and GHI had with the Sanctions Order.

The Sept. 24 hearing resulted in a bench ruling by the Trial Court, followed up by the Sanctions Order. Neither of these rulings specifically identify what facts the Trial Court found to be true or not true. Instead, the Trial Court's bench ruling was that, plain and simple, DEF had interfered with the Commissioner. The Trial Court ruled:

What I am going to focus on is paragraph 9 of the seizure order which forbids people from "interfering with the Commissioner and her authorized agents ... in the discharge of their duties hereunder."

I think there's good reason to believe that [DEF] has been interfering. I think there's reason to fear that he will continue to interfere. As a result, I am going to impose some consequences that are designed to be coercive in nature to ensure that he complies going forward.

(A915 [166:5-167:2]).

Because the Sanctions Order likewise provided no specific findings of fact, DEF's challenging of the Sanctions Order—which had a direct impact on DEF's control of GHI—was viewed as equally lacking in specifics. DEF knew that it simply needed to attempt to show that it had not “interfered” with the Commissioner: assets which XYZ claimed that it owned were not owned by XYZ; utilities which XYZ representatives claimed were in the name of XYZ were actually in the name of DEF's affiliates.¹⁰

It should hardly come as a surprise that DEF did not have “specifics” at his disposal before the hearing on Sept. 24. In light of the fact that DEF is a non-party, his ability to take discovery has been largely blocked. Yet, nevertheless, he was required to participate in an evidentiary proceeding ostensibly proving his ownership of entities without the ability to take depositions or without advance notice of what would be happening at hearings in this matter.

¹⁰ The Trial Court issued its Jan. 2, 2014, Memorandum Opinion on a subsequent motion for sanctions, and a Jan. 16, 2014, Memorandum Opinion on a motion for stay pending appeal. In both of those opinions, the Trial Court has now put in writing what appears to be findings of fact related to the Sept. 24 hearing. However, these opinions were written approximately 3-4 months after the Trial Court ruled, issued orders, and those orders were appealed. Appellants maintain that any factual findings in these opinions cannot serve as the factual findings in this appeal. *See Examen, Inc. v. VantagePoint Venture Partners 1996*, 2005 Del. Ch. LEXIS 55, at *2-3 (Del. Ch. Apr. 29, 2005) (“In Delaware, the rule is that ‘the proper perfection of an appeal to this Court generally divests the trial court of its jurisdiction over the cause of action.’ ‘The applicable principle is that all matters relating to the subject matter of the appeal are outside the jurisdiction of the trial court, but that matters which are independent of or collateral to the subject matter of the appeal may be acted upon by the trial court.’”) (citations omitted).

The main issue following the Sept. 24 hearing was to attempt to reargue that there was no interference with the Commissioner, that the order that was issued did not take into account the broad impact that it had on existing businesses, that the testimony that had been presented by witnesses could be countered with facts showing that the entities were separate, stand-alone entities and that the facts recited by those at the hearing on Sept. 24 were not accurate. *See Expedited Motion to Modify or Alternatively for Relief from Order Imposing Sanctions (A928).*

In short, to the degree that the Trial Court found that there were not enough specifics in the written motion, DEF did not have the knowledge of what he needed to counter the Trial Court's findings. Regardless, the Trial Court's decision to deny this motion less than one hour after its filing was an abuse of discretion.

CONCLUSION

For the reasons stated herein and in the Opening Brief, DEF and GHI respectfully request that the Appealed Orders be reversed.

Respectfully submitted,

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