



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARC HAZOUT,)	No. 353, 2015
)	
Defendant-below/Appellant,)	ON APPEAL FROM
)	INTERLOCUTORY ORDERS OF
v.)	THE HON. WILLIAM C.
)	CARPENTER, JR. OF THE
TSANG MUN TING,)	SUPERIOR COURT DATED
)	JUNE 3 AND JUNE 18, 2015 IN
Plaintiff-below/Appellee.)	C.A. NO. N14C-12-067 WCC

**REPLY BRIEF ON APPEAL OF
DEFENDANT-BELOW/APPELLANT MARC HAZOUT**

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ARGUMENT

I. PERSONAL JURISDICTION IS NOT PROPER UNDER SECTION 3114'S NECESSARY OR PROPER PARTY CLAUSE.

Ting argues that the “necessary or proper” clause of 10 Del. C. §3114 authorizes the assertion of personal jurisdiction over Hazout. In so arguing, Ting concedes that lower courts have recognized that a reading of that clause in the disjunctive raises constitutional issues, and so to avoid that result the clause must be read in the conjunctive as “necessary *and* proper.” *Hana Ranch, Inc. v. Lent*, 424 A.2d 28, 30-31 (Del. Ch. 1980). That interpretation has been considered *stare decisis* by lower courts. *E.g.*, *Ryan v. Gifford*, 935 A.2d 258, 268-69 (Del. Ch. 2007); *Katz v. Halperin*, 1996 WL 66006 at *11 (Del. Ch. Feb. 5, 1996); *In re USA Cafes, L.P. Litig.*, 600 A.2d 43, 53 (Del. Ch. 1991).

Ting asks this Court to reject the holding in *Hana Ranch* in favor of the approach suggested in *In re USA Cafes, L.P. Litig.*¹ Under that approach, courts would apply the phrase “necessary or proper” in the disjunctive, “but protect against

¹

As Ting notes, the doctrine of *stare decisis* generally does not apply in reviewing decisions of lower courts. *State ex rel. Buckson v. Pennsylvania R. Co.*, 267 A.2d 455, 458 (1969). Nonetheless, this Court should consider the persuasive value of *Hana Ranch* given that its conclusion is derived from a decision of this Court, *Armstrong v. Pomerance*, 425 A.2d 174 (Del. 1980).

unconstitutional use of the statute on a case-by-case basis [by] employing the test of the *International Shoe* line of cases to do so.” *Id.* at 53.

International Shoe established the need for minimum contacts with the forum state to satisfy the requirements of Due Process. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Thus, the *In re USACafes* approach requires Ting to establish that (i) Hazout is a necessary or proper party, *and* (ii) Hazout has sufficient minimum contacts with Delaware such that the exercise of jurisdiction does not offend Due Process.

Even before turning to those elements, this Court has stated that Section 3114 “authorizes jurisdiction *only* in actions which are inextricably bound up in Delaware law and where Delaware has a strong interest in providing a forum for redress of injuries inflicted upon or by a Delaware domiciliary, *i. e.*, the Delaware corporation.” *Armstrong*, 425 A.2d at 176 n.5 (italics added). Absent Delaware law, therefore, Section 3114 is inapplicable.

In his opening brief, Hazout demonstrated that the applicable law will be that of either Canada or China, not Delaware. (Hazout Op. Brf. 14-16). Ting made no effort to refute this in the answering brief, implicitly conceding the point. As Ting’s claim fails at this jurisdictional threshold, this Court need not resolve the issue of how to interpret and apply the phrase “necessary or proper.”

Beyond that, there is nothing in the record showing jurisdictionally meaningful minimum contacts. Being a director of a resident corporation does not of itself establish minimum contacts. *Schaffer v. Heitner*, 433 U.S. 186, 215-16 (1977). See also *Van de Walle v. L.F. Rothschild Holdings, Inc.*, 1994 WL 469150 at *3 (Del. Ch. Aug. 2, 1994) (“[a]s *In Re USACAFES*, the *Branson* Chancery opinion, and *Armstrong* make clear, 10 Del. C. § 3114 does not confer personal jurisdiction over nonresident directors merely by virtue of their status as directors of Delaware corporations”).

Indeed, under the “fiduciary shield” doctrine:

if an individual has contact with a particular state only by virtue of his acts as a fiduciary of the corporation, he may be shielded from the exercise, by that state, of jurisdiction over him personally on the basis of that conduct. Thus, his conduct, although it may subject him to personal liability, may not form the predicate for the exercise of jurisdiction over him as an individual. The underpinning of this fiduciary shield doctrine is the notion that it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer.

Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 902 (2nd Cir. 1981) (quoted in *Plummer & Co. Realtors v. Crisafi*, 533 A.2d 1242, 1246 (Del. Super. 1987)).

Being a necessary or proper party does not of itself satisfy the minimum contacts test, either. *Hana Ranch*, 424 A.2d at 30; *Classic Golf Co. v. Karsten Mfg.*

Co., 1986 WL 8953 at *3 (N.D. Ill. 1986) (dismissing action in its entirety due to lack of personal jurisdiction over a necessary party); *Horwitz v. Sax*, 792 N.Y.S.2d 383 (N.Y.A.D. 1st Dept. 2005) (same); *Moseley v. Fillmore Co., Ltd.*, 725 F.Supp.2d 549, 563 (W.D.N.C. 2010) (entire action dismissed due to lack of personal jurisdiction over necessary parties).

Maintenance of this action offends Due Process for additional reasons. As noted above, this case is not governed by Delaware (or even American) law and does not address or remedy violations of the statutory or common law duties imposed on directors of Delaware corporations. The underlying events arose outside of Delaware and any remedy will be performed outside of in Delaware. The fact that Hazout is a director is tangential, at best, to the claim and the desired relief. Delaware does not have an interest in overseeing such cases sufficient to satisfy the requirements of Due Process.

II. PERSONAL JURISDICTION IS NOT PROPER UNDER SECTION 3114'S VIOLATION OF DUTY CLAUSE.

As set forth in Hazout's opening brief, the "violation of duty" clause applies only where the claims are for breach of a duty owed by directors under Delaware common and statutory law. Ting responds that this is not limited to fiduciary duty claims. That proposition, however, does not save Ting, as Section 3114 may be invoked only "in actions which are inextricably bound up in Delaware law...." *Armstrong*, 425 A.2d at 176 n.5.²

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Cases cited by Ting which were not strictly fiduciary duty claims were ones arising under Delaware law. *E.g.*, *Gans v. MDR Liquidating Corp.*, 1990 WL 2851 at *8 (Del. Ch. Jan. 10, 1990) (6 Del. C. §1301); *Assist Stock Mgm't LLC v. Rosheim*, 753 A.2d 974, 981 (Del. Ch. 2000) ("the resolution of this matter is 'inextricably bound up in Delaware law'", footnote omitted).

Ting inaccurately cites *Gans* for the proposition that Section 3114 supports personal jurisdiction when the cause of action is "not entirely unrelated to a director's [or officer's] fiduciary duty." (Ting Ans. Brf. at 20, *quoting Gans* at *10). In *Gans*, the Court of Chancery stated that the "the plaintiffs' claims against the trust [a liquidating trust of a dissolved Delaware corporation] are not 'entirely unrelated' to their claims that the defendants as directors of a dissolved corporation have breached certain statutory and fiduciary duties." WL Op. at *10. In that case, the Court found personal jurisdiction under Section 3114 to be proper because there was a claim that the directors violated their duties under 8 Del. C. §281. The Court went on to state: "This holding is not intended to give an overbroad reading to 10 Del. C. § 3114; rather, it is in accord with prior decisions construing 10 Del. C. § 3114 which have held that 'if jurisdiction attaches at all under the statute, the nonresident is before the Court for any and all relief that might be necessary to do justice between the parties.'" WL Op. at *10.

(continued...)

In his opening brief, Hazout demonstrated that this is action involves a tort claim arising under foreign law, and has no basis in Delaware common or statutory law. Ting has not made any attempt to refute this dispositive fact. Instead, Ting responds that Section 3114 is not limited to fiduciary duty claims. Even accepting Ting's proposition, it does not change the fact that there is no claim against Hazout arising under Delaware law.

Ting also argues that the Complaint need not expressly plead a claim of breach of duty, but that it may be implied. (Ting Ans. Brf. 18). But Ting does not demonstrate how any such claim is implied. Ting does not allege stock ownership (*see* 8 Del. C. §327), or allege actions of the board injuring the corporation and its stockholders (after all, Ting only seeks recovery of money to which Ting claims ownership), or, perhaps most importantly, that the directors of the Company,

²(...continued)

Ting also mis-quotes and incompletely quotes *Lisa , S.A. v. Mayorga*, 2009 WL 1846308 (Del. Ch. June 22, 2009), *aff'd*, 993 A.2d 1042 (Del. 2010), at page 20 of the Answering Brief. The correct and complete quote is: "Moreover, the conduct alleged must have constituted a breach of fiduciary duty to a Delaware corporation for which the plaintiff has standing to sue - that is a duty which runs to the plaintiff either directly or derivatively." WL Op. at *5 (footnote omitted). That case is consistent with Hazout's position.

Ting's citation to *Palmer v. Moffat*, 2001 WL 1221749 (Del. Ch. Oct. 10, 2001), is inapt, as the defendant found subject to personal jurisdiction was a member of the management committee, WL Op. at *4, and so was a fiduciary.

individually or as a board, violated any duties owed to Ting *qua* stockholder. See *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007) (creditors may not bring direct claims against directors for breach of fiduciary duty). Nor does Ting explain how the fraud claim alleged is “inherently intertwined” with Hazout’s duties to the Company and its stockholders.

As noted in Hazout’s opening brief, it was incumbent on Ting to allege a *viable* claim for breach of fiduciary duty. Ting makes no effort to do so, but simply states in a conclusory fashion that it is so. This is not a dispute, as Ting claims “between members of Silver Dragon’s intra-corporate family....” (Ting Ans. Brf. 22). Ting’s claimed status as a stockholder is inconsequential. Ting claims rights solely as a creditor claiming fraud. After having voluntarily elected to transfer the case from the Court of Chancery to the Superior Court, Ting should not now be heard to argue otherwise.

Ting makes a “policy” argument that to limit Section 3114 to fiduciary duty claims would exclude the Superior Court from hearing any cases against directors. Even if that is a judicial, not a legislative, choice, it remains that the statute still must be interpreted and applied in a manner consistent with the Constitutions of the State of Delaware and the United States of America.

Finally, Ting argues that personal jurisdiction over Hazout comports with due process.³ However, the fact that Hazout obtained the benefits of Delaware law does not mean that he was on notice of being haled into Delaware for claims arising solely under foreign law, which do not implicate Delaware law, and the result of which will not affect corporate governance.⁴ Delaware has little if any interest in adjudicating matters of Canadian or Chinese law between nonresidents where the conduct challenged occurred exclusively outside of Delaware. There are alternate fora available. Ting suffers no prejudice from having to litigate elsewhere, and no injury is done to Delaware's interests.

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As part of the due process argument, Ting emphasizes that Hazout signed an agreement which included a Delaware venue agreement. (Ting Ans. Brf. 25-27). It is undisputed that not all parties signed the agreement, and that the agreement had a provision conditioning its effectiveness on signatures from all parties. (B-31). As such, the document is not effective. *Anchor Motor Freight v. Ciabboni*, 716 A.2d 154, 156 (Del. 1998). The Superior Court agreed with this, and Ting has not cross-appealed on this point.

4

Ting is not seeking to affect corporate change, merely to recover money Ting provided to Silver Dragon.

CONCLUSION

WHEREFORE, for the foregoing reasons, as well as the reasons stated in his opening brief, defendant-below/appellant Marc Hazout respectfully requests that this Court reverse the interlocutory ruling of the Superior Court and dismiss him from this action for lack of personal jurisdiction.

Respectfully submitted,

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