



IN THE SUPREME COURT OF THE STATE OF DELAWARE

OPTIMISCORP, a Delaware Corporation,)
)
Defendant Below,)
Appellant,) No.: 223,2017
)
v.)
) On Appeal from the Court of
WILLIAM HORNE,) Chancery of the State of
) Delaware
)
Plaintiff Below,)
Appellee.) C.A. No. 12268-VCS

APPELLANT'S REPLY BRIEF

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NATURE OF PROCEEDINGS¹

In its opening brief, appellant, defendant-below OptimisCorp (“Optimis”) established that the trial court erred by applying a higher standard than that required under settled Delaware law. Rather than meet this purely legal question head on, appellee, plaintiff-below William Horne (“Horne”), mainly comes at it from the direction of harmless error. This circumspect approach, no doubt, is designed to compensate for the lack of any Delaware authority that supports the actually-and-adequately-prosecuted standard the trial court applied below.

Optimis also demonstrated in its opening brief that the Indemnification Opinion rests on the flawed factual foundation that the Plenary Plaintiffs failed to prosecute their contract-based claims against Horne. In his answering brief, Horne not only adopts the trial court’s erroneous factual finding, but embellishes upon it, as he goes as far as to characterize the contract-based claims against him as “non-existent.” From there, Horne argues that the trial court’s “holding that no personal contract claim was prosecuted against Horne ... flows naturally from and simply restates the trial court’s finding that how Horne may have breached any contract was

¹ Defined terms as used herein shall have the same meaning as ascribed to them in Optimis’s Opening Brief.

left ‘unexplained’ by the Underlying Plaintiffs.”² But to equate a claim that was left partially “unexplained” at trial with a claim that was “untried” or is “non-existent”—as Horne does here—requires a leap that finds no record support and can hardly be called a simple restatement of the Trial Opinion.

In arguing for harmless error, Horne contends that the trial court’s “failure to prosecute” finding was not directly tied to its indemnification holding. But here again, Horne goes too far. More accurately stated, the flawed finding that the Plenary Plaintiffs “chose not to prosecute” their contract-based claims against Horne was a material—but not the sole—factor in the trial court’s indemnification decision.

In its opening brief, Optimis showed why the facts underlying the contract-based claims against Horne were not inextricably linked to Horne’s corporate office and powers. Horne, in turn, argues that he could not have participated in the plan to remove Alan Morelli (“Morelli”) as CEO of Optimis if not for his former officer position. Horne’s “but-for” argument has it the wrong way around. The record below demonstrates that Horne would not have been able to participate in the Plenary Defendants’ scheme to amend Optimis’s Stockholders Agreement but for the fact that Horne originally got a copy and became aware of the Stockholders Agreement

² Ans. Br. at 4. *See also Optimis Corp v. Waite*, 2015 WL 5147038, at *73 (Del. Ch. Aug. 26, 2015) (observing that “[h]ow [Horne] breached the Stockholders Agreement is unexplained.”)

in a purely personal capacity, when he was a non-employee, consultant to Optimis. Thus, the core factual allegations behind the Plenary Plaintiffs' contract-based claims against Horne were only made possible by information he acquired as a stockholder, and not by reason of his corporate office or powers. Moreover, the Trial Opinion found that Horne's involvement surrounding the origins of Amendment No. 2 included "an email that includes no text in February 2012," which Horne sent to George Rohlinger, an Optimis employee, for the purpose of forwarding the Stockholders Agreement. *OptimisCorp*, 2015 WL 5147038, at *58. *See also id.* at *73 (noting that "there is no evidence that Defendant Horne ever signed Amendment No. 2, nor was Horne present at the October 20 Meeting."). Horne used his *personal* e-mail account to send that e-mail to Rohlinger. *Id.* at *36.

For these reasons, as detailed in Optimis's opening brief, the trial court's Amended Final Order, awarding Horne over \$2 million in indemnified fees and costs, should be vacated and the matter should be remanded to the trial court for purposes of determining and deducting the non-indemnifiable expenses from Horne's indemnification award.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY APPLYING A MORE EXACTING STANDARD THAN THAT REQUIRED BY SETTLED DELAWARE LAW.

Optimis established in its opening brief that the trial court erred by creating and applying a heightened standard that required Optimis to show it actually and adequately prosecuted its breach of contract claims against Horne at trial. In response, Horne contends that the trial court “never tied the failure to prosecute to the test for satisfying the ‘by reason of the fact’ test.” Ans. Br. at 15. Horne further argues that even if the trial court did apply a heightened standard it was merely “harmless error” because the trial court also held that “even if the contract claims had been prosecuted, they would meet the ‘by reason of the fact’ standard.” *Id.*; *see also id.* at 4. Horne is wrong in both respects.

First, the Indemnification Opinion shows that the trial court made two distinct holdings with respect to the Plenary Plaintiffs’ contract-based claims. The trial court held that:

the theories of liability actually prosecuted against Horne were very much “moving targets,” and ultimately the trial court was left to observe with respect to the breach of contract claim that “[h]ow [Horne] breached the Stockholders Agreement [was] unexplained by Plaintiffs.” Moreover, *even if the Morelli Plaintiffs had actually prosecuted their breach of contract claim against Horne, I would still conclude* that the claim fell within the “by reason of the fact” standard because the alleged breach of contract—Horne’s advising the Company’s counsel that the removal of Morelli as CEO would require an amendment to the stockholders agreement—was determined by the trial court to be an act

taken in compliance with Horne's fiduciary duties as an officer of the Company.

Horne v. OptimisCorp, 2017 WL 838814, at *4 (Del. Ch. Mar. 3, 2017) (emphasis added).

By phrasing its holding disjunctively, the trial court identified two independent reasons for holding that Horne was entitled to indemnification related to Optimis's contract-based claims. Thus, the Indemnification Opinion shows that the trial court based its indemnification decision, at least in part, on the factual finding that the Plenary Plaintiffs failed to prosecute their contract claims against Horne. For this reason, the trial court's holding was not merely harmless error as Horne contends.

Moreover, the trial court's finding that the Plenary Plaintiffs did not "actually prosecute" their breach of contract claim was neither factually accurate nor relevant under Delaware law. The trial court's finding was factually incorrect because on at least three separate occasions, the Trial Opinion acknowledges that Optimis presented breach of contract claims against Horne at trial. Op. Br. at 17 (citing *Optimiscorp*, 2015 WL 357675, at *1, *56, *73, *75-76). The Indemnification Opinion's finding and Horne's argument that the Plenary Plaintiffs failed to prosecute their contract-based claims against him is also contradicted by the pre-trial rulings in the Plenary Action. *See* A00852-53. For example, in its Order denying the Plenary Plaintiffs' motion for leave to amend their complaint and granting in part

and denying in part the Plenary Defendants' motion *in limine*, the trial court expressly recognized that the Plenary Plaintiffs were asserting breach of contract claims against all Plenary Defendants, including Horne. *See OptimisCorp v. Waite*, 2015 WL 357675, at *1 (Del. Ch. Jan. 28, 2015). Likewise, Horne moved for summary judgment seeking the dismissal of the breach of contract and implied covenant claims asserted against him but the trial court denied Horne's motion and allowed those claims to proceed to trial. *See OptimisCorp v. Waite*, 2015 WL 397676 (Del. Ch. Jan. 28, 2015).

The Indemnification Opinion ignores all of this and, instead, seizes on the Trial Opinion's reference to Horne's argument at trial that the claims against him were "moving targets." *Horne*, 2017 WL 838814, at *4 (quoting *Optimiscorp*, 2015 WL 5147038, at *55). From this, the trial court inferred that the breach of contract and implied covenant claims were not "actually prosecuted." This inference was neither accurate nor entitled to deference on this appeal. *See Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972); *Dutra de Amorim v. Norment*, 460 A.2d 511, 514 (Del. 1983); *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del. 1982); *Int'l Boiler Works Co. v. General Waterworks Corp.*, 372 A.2d 176, 177 (Del. 1977); *Levin v. Smith*, 513 A.2d 1292, 1301 (Del. 1986).

The trial court's reasoning is also not supported by Delaware law. Neither the trial court nor Horne have cited to a case where an officer was granted

indemnification because the company was found to have not actually and adequately prosecuted an otherwise non-indemnifiable claim at trial. For good reason, too, because in order to be entitled to indemnification the officer must be successful in his defense irrespective of how cogently those claims were presented at trial. *See Perconti v. Thornton Oil Corp.*, 2002 WL 982419, at *3 (Del. Ch. May 3, 2002). The only inquiries that matter are whether the legal expenses were incurred by reason of the fact the individual was an officer and that he was successful in his defense. Whether the company actually and adequately prosecuted its claims at trial is not a relevant inquiry under the established standard.

Horne also relies on the public policy implications behind 8 *Del. C.* § 145(c). Ans. Br. at 16. While it is true that Delaware law requires resolving ambiguity in favor of indemnification in order to encourage individuals to serve as officers, it is equally established that “‘by reason of the fact’ is not construed so broadly as to encompass every suit brought against an officer and director.” *Weaver v. ZeniMax Media, Inc.*, 2004 WL 243163, at *3 (Del. Ch. Jan. 30, 2004). Horne is only entitled to indemnification if he satisfies the requirements of 8 *Del. C.* § 145. The trial court’s inquiry into whether the Plenary Plaintiffs actually and adequately prosecuted their contract-based claims at trial does not further promote Delaware’s policy goals, nor does it create an ambiguity that should be resolved in Horne’s favor.

II. THE TRIAL COURT ERRED BY FINDING THAT THE CONTRACT-BASED CLAIMS WERE BROUGHT BY REASON OF THE FACT THAT HORNE WAS A FORMER OFFICER.

Horne argues that the contract-based claims asserted against him were by reason of the fact that he was a former officer of Optimis because he “would not have known about the confidential investigation into Morelli’s misconduct, or have been involved in contingency planning for the possibility of Morelli’s removal had he not been CFO.” Ans. Br. at 21. But that is not what the Trial Opinion found, nor was that what the Plenary Plaintiffs alleged in the Plenary Action.

Horne was one of the original parties to the Stockholders Agreement and helped draft it while he was a non-employee, consultant to Optimis. A00528 (citing *Optimiscorp v. Waite*, No. 8773-VCP, Transcript of Videotaped Deposition of William Horne, Tr. at 86 (Del. Ch. May 7, 2014)). Horne started at Optimis as a consultant in 2006 and became its CFO in January 2008. *Optimiscorp*, 2015 WL 5147038, at *3, *23.

The Trial Opinion found that on February 20, 2012, using his *personal* e-mail account, Horne forwarded a copy of the Stockholders Agreement to George Rohlinger, another Optimis employee, who in turn relayed the document to John Waite, a former Optimis director. *Id.* at *36. The Plenary Complaint alleged that, after receiving the February 20, 2012 e-mail, Waite “contacted certain of the other directors and stockholders (a majority of whom was needed to amend the

Stockholders Agreement) and offered them ... valuable inducements ... [in what constituted] illegal vote buying.” A00530 (quoting Plenary Complaint at ¶ 22).

At some point in the second half of 2012, Horne met with Waite and Laura Brys, Optimis’s counsel, and recommended that, if Morelli was removed, “the Stockholders Agreement probably would need to be amended.” *Optimiscorp*, 2015 WL 5147038, at *48. The Trial Opinion found that Horne reasoned that: “If the board decided that Mr. Morelli needed to be removed as CEO, then if he had the ability to just turn around, appoint new board members and reappoint himself as CEO, I think that would go against the spirit of what needed to be done.” *Id.* This led to Amendment No. 2 to the Stockholders Agreement. *Id.*

Horne’s actions surrounding the genesis of Amendment No. 2 did not require an exercise of his decision-making authority, but stem from his knowledge of the terms of Stockholders Agreement that he acquired when he was a non-employee, consultant of Optimis. Because Horne used knowledge he gained in his personal capacity to engage in the conduct underlying the contract-based claims, he is not entitled to indemnification.

In order for an officer’s actions to be indemnifiable, there must be “a nexus or causal connection between [a claim] and one’s official capacity. . .” *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 215 (Del. 2005). Thus, “[t]here is no causal connection between a corporate official’s acts and his or her corporate power when the parties

are litigating a specific and personal contractual obligation that does not involve the exercise of judgment, discretion, or decision-making authority on behalf of the corporation.” *Charney v. Am. Apparel, Inc.*, 2015 WL 5313769, at *16 (Del. Ch. Sept. 11, 2015) (internal quotation marks and citation omitted); *see also Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1011 (Del. Ch. 2007). Rather, to establish the requisite nexus, the indemnifiable conduct must involve the “use of corporate powers or *the use of knowledge derived from the corporate position.*” Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 8.2(b)(1) at 8-13 (2017) (emphasis added).

Horne asserts in his answering brief that he was involved in a discussion with Optimis’s counsel concerning the necessity of amending the Stockholders Agreement solely because of his position as a senior officer of Optimis. Ans. Br. at 21. Based on this, Horne argues that Amendment No. 2 was inextricably connected to the actions taken at a board of directors meeting where Morelli was removed. *Id.* at 24. In support of his argument, Horne primarily relies on *Zaman v. Amadeo Holdings, Inc.*, 2008 WL 2168397, at *24 (Del. Ch. May 23, 2008). In *Zaman* the conduct alleged to have been a breach of the officer’s employment agreement was “identical” to the conduct alleged to have been a breach of the officer’s fiduciary duties. *Zaman*, 2008 WL 2168397, at *29 n.119 (citing *Reddy v. Electronic Data Sys. Corp.*, 2002 WL 1358761, at *6 (Del. Ch. June 18, 2002)). The Court in *Zaman*

specified that the identical nature of the conduct underlying both claims was the critical factor in determining whether contract claims were a proper subject of advancement. *Id.*

Here, however, unlike in *Zaman*, Horne's alleged misconduct underlying the contract claims is distinct from his alleged misconduct underlying the fiduciary claims. In support of their contract claims, the Plenary Plaintiffs pointed to Horne's use of his intimate knowledge of the Stockholders Agreement to recommend that it be amended to remove Morelli and Analog's power to appoint directors. *See OptimisCorp v. Waite*, 2015 WL 5147038, at *48 (Del. Ch. Aug. 26, 2015). In addition, the Trial Opinion noted that Horne's circulation of the Stockholders Agreement from his personal email account was one of the discreet personal acts that formed the basis for the contract-based claims. *Optimiscorp*, 2015 WL 5147038, at *36. These claims are not identical to the Plenary Plaintiffs' fiduciary claims.

Conversely, in support of their fiduciary claims, the Plenary Plaintiffs alleged that Horne informed the Director Defendants of his conversation with Geller in February 2012, and that he worked with the Underlying Director Defendants to undermine Morelli's authority in Optimis. A00548. Horne was also alleged to have breached his fiduciary duties by "paying large retroactive bonuses to the Rancho Defendants in March 2012." *Id.* Then, after the Section 225 Action was resolved

and Morelli was reinstated as CEO, Horne was alleged to have continued to breach his fiduciary duties by interfering with certain contracts to which Optimis was a party. *Id.* In this way, the fiduciary claims asserted against Horn were not identical to the breach of contract claims and, therefore, the conduct underlying Horne's breach of contract is not inextricably connected to his status as a former officer.

In his answering brief, Horne attempts to distinguish *Cochran v. Stifel Fin. Corp.*, 2000 WL 1847676 (Del. Ch. Dec. 13, 2000) and *Charney v. Am. Apparel, Inc.*, 2015 WL 5313769, at * 13 (Del. Ch. Sept. 11, 2015) by focusing on factual differences that are not dispositive. But the holdings of *Cochran* and *Charney* are not limited to their facts and the legal principles articulated in those cases are applicable. Here, like *Cochran* and *Charney*, the challenged conduct did not involve actions taken as corporate officials. Rather, Horne was alleged to have breached the Stockholders Agreement and the implied covenant of good faith and fair dealing based on knowledge and information he gained while he was a consultant for Optimis. Accordingly, the principles articulated in *Cochran* and *Charney* apply with equal force here; that is, where an officer breaches an obligation owed to the company that is distinct from his obligation owed as a fiduciary, claims arising from such breaches are not indemnifiable under Section 145.

CONCLUSION

For the foregoing reasons, and the reasons set for in Optimis's opening brief, Optimis, respectfully requests that (i) the Amended Final Order be partially vacated, (ii) the Indemnification Opinion be reversed in the respects detailed above, and (iii) the matter be remanded to the trial court for purposes of determining and deducting the non-indemnifiable expenses from Horne's indemnification award.

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