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Court Declines to Restore Corporate Existence of Dissolved Corporation to Address Lawsuit Filed Prior to Dissolution

Where a dissolved corporation was still in the winding up phase and under the operation of its directors, the Court of Chancery denied a motion to restore its corporate existence and appoint a trustee while litigation filed prior to the filing of the dissolution was still pending. *LeCrenier v. Central Oil Asphalt Corp.*, C.A. No. 4927-VCN (Del. Ch. Dec. 22, 2010).

Background

In 2005, Plaintiffs David and Ivy LeCrenier brought a personal injury action in Florida for injuries allegedly a result of exposure to Central Oil's benzene-containing products. In 2007, during the pendency of the Florida action, Central Oil filed a certificate of dissolution. During the winding up process, the Plaintiffs filed a claim on Central Oil, which the company denied along with Plaintiffs' request for a holdback of funds to satisfy a potential judgment. Plaintiffs subsequently filed this action in Delaware in September 2009 seeking to nullify the certificate of dissolution and to restore Central Oil's corporate existence because the company allegedly was not properly wound up. In addition, Plaintiffs sought the appointment of a receiver under 8 *Del. C*. § 279 to carry out Central Oil's business. Central Oil and the individual defendants, who are current and former directors, moved to dismiss.

Motion to Dismiss for Lack of Personal Jurisdiction -- Rule 12(b)(2)

As non-residents of Delaware, for there to be personal jurisdiction over the individual defendants, Plaintiffs must show "(1) a statutory basis for service of process; and (2) the requisite 'minimum contacts' with the forum to satisfy constitutional due process." Plaintiffs argued that personal jurisdiction existed under 10 *Del. C.* § 3114, which authorizes service over a nonresident director "only where the cause of action is based on such an individual's breach of fiduciary duty . . . for which the plaintiff has standing to sue – that is a duty which runs to the plaintiff either directly or derivatively." Because Plaintiffs did not allege any breach of fiduciary duty, the complaint was dismissed as to the Individual Defendants for lack of personal jurisdiction.

Motion to Dismiss for Failure to State a Claim – Rule 12(b)(6)

<u>Restoration of Corporate Existence</u>

While the Plaintiffs sought an order nullifying the certificate of dissolution and restoring the corporate existence of Central Oil, under 8 *Del. C.* § 278 the corporate existence of a dissolved corporation is extended for a three year winding up period. That section also provides that an action against the dissolved corporation is not lost just because of the dissolution.

Because the Florida action was brought prior to the dissolution filing, Central Oil would retain its corporate existence until the conclusion of that suit. Thus, because Plaintiffs sought to restore a corporation that was still in existence, this claim was dismissed for failure to state a claim upon which relief can be granted.

Appointment of a Receiver

With Central Oil's directors still winding up the company and with no allegation that they had been derelict in their duties, the Court found no basis to appoint a trustee and the claim was dismissed.

Request for Attorneys' Fees and Costs

In seeking attorneys' fees and costs, the Defendants argued that their motion "would have been unnecessary had Plaintiffs made any attempt to investigate, even on a cursory level, the facts and law before filing the Complaint . . . ." The Court noted that under Delaware law, which applies the American Rule, parties generally pay for their own fees and expenses. However, where a party has exhibited bad faith, an exception to the American Rule exists and fees and costs may be shifted. Bad faith in this context is more than "a party acting merely under an incorrect perception of its legal rights" but rather "an abuse of the judicial process" and actions that "clearly evidence[] bad faith." Delaware courts, despite broad discretion, "will not award attorneys' fees lightly under this exception."

While the Court indicated that the Plaintiffs could have been more cooperative in the information gathering stage and while they created confusion with their proposed remedies, the Court did not find bad faith. Rather, the Plaintiffs had a legitimate concern (whether Central Oil could satisfy a judgment), but simply exhibited a "misguided understanding of the DGCL."

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