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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3701-14T3

KELLY MORAN and CAROL MORELLO,

Plaintiffs-Respondents,

v.

BIOLITEC INC. and BIOMED
TECHNOLOGY HOLDINGS LTD.,

Defendants,

and

BIOLITEC AG and WOLFGANG
NEUBERGER,

Defendants-Appellants.

Argued March 21, 2017 – Decided November 14, 2017

Before Judges Ostrer, Leone and Vernoia.

On appeal from the Superior Court of New
Jersey, Chancery Division, Mercer County,
Docket No. C-000063-09.

Barry D. Szaferman and Edward Griffith (The
Griffith Firm) of the New York bar, admitted
pro hac vice, argued the cause for appellants
(Szaferman, Lakind, Blumstein & Blader, PC,
and Mr. Griffith, attorneys; Nathan M.
Edelstein and Mr. Griffith, on the briefs).

Peter Reiser (Eiseman Levine Lehrhaupt & Kakoyiannis, PC) of the New York bar, admitted pro hac vice, argued the cause for respondents (Berman Rosenbach, PC, Mr. Reiser and Eric R. Levine (Eiseman Levine Lehrhaupt & Kakoyiannis, PC) of the New York bar, admitted pro hac vice, attorneys; Mr. Rosenbach, Mr. Levine and Mr. Reiser, on the brief).

The opinion of the court was delivered by

OSTRER, J.A.D.

This case does not belong in New Jersey. Defendants Biolitec AG, a German corporation, and its CEO and majority owner, Wolfgang Neuberger, an Austrian, lacked the requisite minimum contacts with New Jersey to support the trial court's exercise of personal jurisdiction. Therefore, on defendants' appeal, we reverse the default judgment that was entered against them after their answer was stricken for discovery violations.

I.

We limit our discussion to the pertinent jurisdictional facts. Biolitec, Inc. was incorporated in New Jersey in 1989. The certificate of incorporation designated Carol Morello, then a New Jersey resident, as its registered agent. The original board of directors consisted of plaintiffs (who were married),

Neuberger, and a fourth man.¹ Plaintiffs listed the same New Jersey address. Neuberger and the fourth member listed a common address in West Germany. An attorney was listed as the incorporator.² Neuberger was CEO and chairman. Plaintiffs each had a five percent ownership interest, and Neuberger the remaining ninety percent. In 2000, Neuberger transferred his ownership interest to Biolitec AG.

Although Biolitec, Inc. was initially located in Morello's New Jersey home, plaintiffs and the company moved to Connecticut the following year. Since 1995, Biolitec, Inc. has been headquartered in Massachusetts.

Besides Biolitec, Inc., Neuberger was affiliated with several foreign companies, all of which fell under the same corporate umbrella. Neuberger solely owned Biomed Technology Holdings, Ltd. (Biomed), a Malaysian-based corporation. Biolitec AG, the German corporation Neuberger managed, is the parent of several other foreign companies that manufacture and distribute medical lasers

¹ Although plaintiffs contend before us that Neuberger "made the decision to incorporate in New Jersey," they cite no record evidence for that assertion.

² According to the certificate of incorporation, the company was initially named "CeramOptec, Inc."; however, in 2000, the parties renamed the company "BioLitec, Inc.," to "coincide[] with a decision to focus the company's business on providing fiber optics and lasers to the medical market." (We follow both parties' spelling of that company name without an internal capital "L".)

and fiber optics. Through Neuberger's transfer of his ninety-percent ownership interest of Biolitec, Inc., that firm became a subsidiary of Biolitec AG.

Plaintiffs alleged that between 2000 and 2008, Neuberger and Biolitec AG "looted" Biolitec, Inc. of over \$12,000,000. Plaintiffs claimed Neuberger and Biolitec AG engaged in several schemes to divert Biolitec, Inc.'s profits. This included overcharging Biolitec, Inc. for goods, services, and lasers from affiliated companies; inflating invoices for overhead charges and fees; and charging illegitimate interest on inter-company fund transfers. All these alleged activities occurred while Biolitec, Inc. was headquartered in Massachusetts.

Based on these facts, plaintiffs filed a complaint against defendants in 2009 under the Oppressed Minority Shareholder statute, N.J.S.A. 14A:12-7, seeking the involuntary dissolution of Biolitec, Inc. Defendants responded by moving to dismiss the complaint for lack of personal jurisdiction.

In support of their motion, Neuberger submitted a certification stating he was an Austrian citizen, did not reside in New Jersey, and did not own or lease any property in New Jersey. He asserted, "At no time have I personally solicited business or advertised in New Jersey. Moreover, I have not personally contracted to purchase or supply goods and/or services in New

Jersey." Neuberger added, "Neither Biolitec AG nor any of its employees have solicited business or advertised in New Jersey. Similarly, Biolitec AG has not contracted to purchase or supply goods and/or services in New Jersey." Neither plaintiff submitted a certification in response to defendants' motion to dismiss. At oral argument on the motion, defense counsel argued that the record failed to establish specific jurisdiction over defendants and that the certificate of incorporation, alone, does not suffice.

Plaintiffs responded by characterizing defendants' corporate structure as a "shell game" to avoid personal jurisdiction, noting that Neuberger had contested personal jurisdiction in a Massachusetts lawsuit. Plaintiffs argued that by forming a corporation in New Jersey, Neuberger subjected himself to personal jurisdiction. Additionally, plaintiffs contended that the trial court should follow Delaware caselaw, which authorized personal jurisdiction over nonresident directors or shareholders.

The trial court denied defendants' motion to dismiss. Citing Armstrong v. Pomerance, 423 A.2d 174 (Del. 1980), the court found that both Neuberger and Biolitec AG had sufficient minimum contacts under International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), to exercise specific personal jurisdiction. Given Neuberger's role as an original board member of Biolitec, Inc. in New Jersey, and his position as president and

CEO, the court concluded that Neuberger "knowingly availed himself of the protection of New Jersey law," and "reasonably should expect to be ha[ll]ed into a New Jersey court" Conceding the case for asserting jurisdiction against Biolitec AG was more difficult, the court found that Biolitec AG subjected itself to New Jersey jurisdiction when it obtained a controlling interest in a closely held New Jersey corporation. The court highlighted the fiduciary duties of shareholders and directors of closely-held corporations.³

On appeal, defendants contend the trial court erred in determining that there were sufficient minimum contacts to exercise personal jurisdiction.

II.

We engage in a two-part review of a trial court's exercise of jurisdiction, since it involves a "mixed question of law and fact" Citibank, N.A. v. Estate of Simpson, 290 N.J. Super. 519, 532 (App. Div. 1996). "We review the court's factual findings with respect to jurisdiction to determine whether they were supported by substantial, credible evidence" Mastondrea v. Occidental Hotels Mgmt. S.A., 391 N.J. Super. 261, 268 (App. Div. 2007) (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65

³ The court found no basis to exercise personal jurisdiction over BioMed, and dismissed the complaint against it.

N.J. 474, 484 (1974)). "However, whether these facts support the court's exercise of personal jurisdiction over a defendant is a question of law, which we review de novo." Patel v. Karnavati America, LLC, 437 N.J. Super. 415, 423 (App. Div. 2014) (internal quotation marks and citation omitted).

As the trial court judge found that general jurisdiction did not exist, and plaintiffs do not challenge that finding, we limit our discussion solely to specific jurisdiction. See Waste Mgmt. v. Admiral Ins. Co., 138 N.J. 106, 119 (1994) (distinguishing between the two theories of personal jurisdiction, explaining that "a cause of action [that] arises directly out of a defendant's contacts with the forum state" is specific and one "based instead on the defendant's continuous and systematic activities in the forum" is general), cert. denied, 513 U.S. 1183, 115 S. Ct. 1175, 130 L. Ed. 2d 1128 (1995). In other words, specific jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., L.L.C., 450 N.J. Super. 1, 68 (App. Div. 2017) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796, 803 (2011)).

In conformance with due process, specific jurisdiction over a non-resident can only be established if the individual has "certain minimum contacts" with the forum state, "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Lebel v. Everglades Marina, Inc., 115 N.J. 317, 322 (1989) (quoting Int'l Shoe Co., supra, 326 U.S. at 316, 66 S. Ct. at 158, 90 L.Ed. at 102). This minimum contacts inquiry focuses on "the relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, 433 U.S. 186, 204, 97 S. Ct. 2569, 2580, 53 L. Ed. 2d 683, 698 (1977). It is critical to our due process analysis "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws." Waste Mgmt., supra, 138 N.J. at 120 (quoting Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283, 1298 (1958)). See also Dutch Run-Mays Draft, LLC v. Wolf Block, LLP, 450 N.J. Super. 590, 599 (App. Div. 2017) ("Thus, courts examine whether a non-resident defendant has 'purposefully avail[ed] itself of the privilege of conducting activities' within the forum, such that the defendant can reasonabl[y] anticipate being haled into the forum." (quoting

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528, 542 (1985)).⁴

Once a defendant challenges personal jurisdiction, the plaintiff bears the burden of demonstrating minimum contacts. Blakey v. Cont'l Airlines, 164 N.J. 38, 71 (2000). If the plaintiff succeeds, the defendant bears the burden of showing the unfairness or unreasonableness of asserting jurisdiction. Waste Mgmt., supra, 138 N.J. at 124-25. These contacts should be established "through the use of sworn affidavits, certifications, or testimony." Jacobs v. Walt Disney World, Co., 309 N.J. Super. 443, 454 (App. Div. 1998).

The United States Supreme Court's decision in Shaffer, supra is instructive. In that case, a nonresident shareholder of Greyhound Corp. – a Delaware corporation with its principal place of business in Arizona – sued its present and former officers or directors in Delaware, alleging a breach of their fiduciary duties.

⁴ We recognize, but need not resolve, the debate over the significance of a defendant's mere "expectations" in the personal jurisdiction analysis. As a plurality of the United States Supreme Court noted, reversing a decision of our Supreme Court, "[I]t is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 883, 131 S. Ct. 2780, 2789, 180 L. Ed. 2d 765, 776 (2011) (Nicastro), reversing Nicastro v. J. McIntyre Mach., Ltd., 201 N.J. 48 (2010). See Patel v. Karnavati Am., LLC, 437 N.J. Super. 415, 425-29 (App. Div. 2014) (discussing Nicastro).

433 U.S. at 189-190, 97 S. Ct. at 2572, 53 L. Ed. 2d at 688-89. The plaintiff never alleged that any of the defendants ever set foot in Delaware, or that any act related to his lawsuit took place there. Id. at 213, 97 S. Ct. at 2584, 53 L. Ed. 2d at 703. Instead, he presented two different theories for establishing personal jurisdiction over the defendants. First, relying on a state statute that treated stock in Delaware as being physically present in the state, he argued that Delaware had quasi in rem jurisdiction over the defendants since they all owned stock in a Delaware corporation. Id. at 191-94, 97 S. Ct. at 2573-75, 53 L. Ed. 2d 689-92. Second, the plaintiff argued that the defendants' positions as directors or officers of a Delaware corporation provided sufficient minimum contacts with the state for it to exercise personal jurisdiction. Id. at 213-14, 97 S. Ct. at 2584-85, 53 L. Ed. 2d at 703-04.

The Supreme Court rejected both theories. As for the plaintiff's quasi in rem argument, the Supreme Court concluded that the stock ownership, alone, did not establish personal jurisdiction:

[T]hat property is not the subject matter of this litigation, nor is the underlying cause of action related to the property. [The defendants'] holdings in Greyhound do not, therefore, provide contacts with Delaware sufficient to support the jurisdiction of that State's courts over [the defendants].

[Id. at 213, 97 S. Ct. at 2584, 53 L. Ed. 2d at 703.]

Similarly, the plaintiff's second argument failed as the defendants' positions within the corporation fell short of establishing sufficient minimum contacts:

[This argument] does not demonstrate that appellants have "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State," in a way that would justify bringing them before a Delaware tribunal. [The defendants] have simply had nothing to do with the State of Delaware. Moreover, [the defendants] had no reason to expect to be haled before a Delaware court.

[Id. at 216, 97 S. Ct. at 2586, 53 L. Ed. 2d at 705 (quoting Hanson, 357 U.S. at 253, 78 S. Ct. at 1240, 2 L. Ed. 2d at 1298).]

Guided by the Supreme Court's decision in Shaffer, we conclude the trial court erred in exercising personal jurisdiction over defendants. It is undisputed that defendants have never resided in New Jersey; and neither Neuberger personally, nor Biolitec AG engaged in business here. Biolitec, Inc. left New Jersey in 1990. Moreover, plaintiffs do not contend that any of the alleged "looting" schemes, which gave rise to their cause of action, took place in New Jersey.

Neuberger's role as an original member of the board in 1989 is an insufficient basis for jurisdiction, as plaintiffs' claims do not arise from, or relate to the incorporation itself. Cf.

Sears, Roebuck & Co. v. Sears, 744 F. Supp. 1297, 1303 (D. Del. 1990) (finding that a corporation's formation of a subsidiary in the forum state constituted "an act sufficient to confer personal jurisdiction over it for causes of action related to that act of incorporation") (emphasis added).

Similarly, Biolitec AG's ownership interest in Biolitec, Inc., without more, fails to establish personal jurisdiction. See Shaffer, supra, 433 U.S. at 213-15, 97 S. Ct. at 2584-86, 53 L. Ed. 2d at 703-05; Cruz v. Ortho Pharm. Corp., 619 F.2d 902, 905 (1st Cir. 1980) (stating that jurisdiction over a subsidiary "does not confer jurisdiction over its nonresident parent, even if the parent is sole owner of the subsidiary"); cf. Pfundstein v. Omnicom Group, Inc., 285 N.J. Super. 245, 254 (App. Div. 1995) (applying general jurisdiction analysis and declining to impute actions of subsidiary to corporate parent). Simply put, defendants lack the required minimum contacts to justify haling them into court here.

We also part company with the trial court's reliance on Armstrong, supra, and Delaware law. In Armstrong, the Delaware Supreme Court affirmed the trial court's exercise of personal jurisdiction over nonresident directors of a Delaware corporation. 423 A.2d at 175-76, 179. The corporation did the minimum business necessary to maintain its status as a Delaware corporation, and none of the directors had any connection with the state besides

their positions within the corporation. Id. at 175. However, relying on 10 Del. Code Ann. § 3114,⁵ the court explained "[t]he defendants accepted their directorships with explicit statutory notice, via § 3114, that they could be haled into the Delaware Courts to answer for alleged breaches of the duties imposed on them by the very laws which empowered them to act in their corporate capacities." Id. at 176. Finding § 3114 constitutional, the court concluded that the statute was sufficient to confer jurisdiction over the nonresident directors.⁶

However, New Jersey has no analog to § 3114 that would establish personal jurisdiction over either Neuberger or Biolitec AG. Plaintiffs suggest that the omission is "immaterial," because our courts exercise personal jurisdiction to the fullest extent the Constitution permits. See Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971). We disagree. The basis for jurisdiction in Armstrong was not the Constitution; it was the adoption of a statute that

⁵ 10 Del. Code Ann. § 3114 provides that any nonresident who accepts a directorship position with a Delaware corporation "consent[s] to jurisdiction in suits relating to the defendant's capacity as director." Id. at 175.

⁶ In reconciling its holding with Shaffer, the court explained, "[t]he only substantive difference for present purposes between Shaffer and the instant case is the existence of § 3114 as the basis of jurisdiction; we think that is sufficient to render the assertion of in personam jurisdiction constitutional in this case." Id. at 180.

established consent to be sued in the forum state notwithstanding constitutional limits outlined in Shaffer. Other courts have relied on the absence of such a "consent-to-be-sued" statute and found personal jurisdiction lacking in lawsuits against officers and directors whose only contact with the forum state was their position with a corporation incorporated there. See American Freedom Train Found. v. Spurney, 747 F.2d 1069, 1074 (1st Cir. 1984) (comparing law of Massachusetts with that of Delaware and Connecticut); Behm v. John Nuveen & Co., 555 N.W.2d 301, 306-07 (Minn. Ct. App. 1996) (comparing Minnesota and Delaware law). We likewise find Armstrong distinguishable, based on the absence in New Jersey of a statute like Delaware's.⁷

Finally, we briefly distinguish Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 831 F.2d 522 (4th Cir. 1987) and Springs Industries, Inc. v. Gasson, 923 F. Supp. 823 (D.S.C. 1996), upon which plaintiffs rely. In Pittsburgh Terminal Corp., the plaintiff initiated a stockholder derivative action against nonresident directors of a West Virginia corporation in a West Virginia court. 831 F.2d at 524. Although nonresidents, the Fourth Circuit noted

⁷ We also note that questions have been raised about the Delaware statute's constitutionality. See Eric A. Chiappinelli, The Myth of Director Consent: After Shaffer, Beyond Nicastro, 37 Del. J. Corp. L. 783, 818 (2013) ("Nicastro leaves no doubt that Delaware violates the Constitution when it asserts personal jurisdiction over fiduciaries under Section 3114.>").

the degree of contacts the directors had with the state, id. at 524, and found it significant that the corporation conducted business exclusively in West Virginia. Id. at 528 ("Unlike Schaffer, this is not a case where the corporation is a phantom resident of the chartering State."). Similarly, in Springs Industries, the plaintiff filed fraud and civil conspiracy claims in South Carolina against a nonresident director of South Carolina corporations. 923 F. Supp. at 824-25. Although the director's tortious acts took place out of state, because the act was causally related to the plaintiff's injury within South Carolina, the court found that there were sufficient grounds for it to exercise personal jurisdiction. Id. at 827.

Here, however, defendants have no identifiable contacts with New Jersey and, more importantly, Biolitec, Inc. has not done business in the state in over twenty-five years. Additionally, none of the alleged injuries sustained took place in New Jersey. Since defendants lacked the minimum requisite contacts, the trial court's exercise of personal jurisdiction was not warranted.

Reversed. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION