

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: December 8, 2008
Decided: February 18, 2009

Michael J. Maimone
Titania Mack Parker
Greenberg, Traurig, LLP
The Nemours Building
1007 North Orange Street, Suite 1200
Wilmington, DE 19801

Michele C. Gott
Kathleen M. Miller
Etta R. Wolfe
Smith, Katzenstein & Furlow LLP
800 Delaware Avenue
P.O. Box 410
Wilmington, DE 19899

Re: *Banet, et al. v. Fonds de Régulation et de Contrôle Café Cacao,
et al.*, Civil Action No. 3742-CC

Dear Counsel:

This case arises out of a protracted dispute between (1) Hausmann-Alain Banet, Lion Capital Management, LLC (“LCM”), and Fulton Cogeneration Associates, LP (“FCA”) and (2) Fonds de Régulation et de Contrôle Café Cacao (“FRC”), the New York Chocolate and Confections Company, Inc. (“NYCCC”), and NYCCC’s directors. Plaintiffs have moved for judgment on the pleadings or, in the alternative, for summary judgment as to Count I of their amended complaint—the request for appointment of a receiver for NYCCC under § 291 of the Delaware General Corporation Law. After reading the briefs and reviewing the record before me, I conclude that based on the incomplete and contradictory record

and constrained by this case's procedural posture, I must deny plaintiffs' motion for summary judgment.¹

I. FACTS

The material facts in this case are vigorously disputed. Needless to say, a murky picture of the factual situation appears before this Court as I piece together what appears, in most instances, as conjecture and finger-pointing.

FRC, a quasi governmental agency formed under the laws of the Republic of the Côte d'Ivoire (commonly known as the Ivory Coast), represents the interests of a collection of farmers' cooperatives in the Côte d'Ivoire that grow cacao, the raw material for chocolate. In 2003, FRC decided to fund the purchase of a former Nestle chocolate factory in Fulton, New York. Through LCM, Banet assisted in purchasing the factory. In order to operate the chocolate plant, NYCCC was incorporated on October 31, 2003.

As part of operating the factory, NYCCC entered into an agreement with FCA to supply steam to the factory. NYCCC fell behind on its payments and FCA sued NYCCC to recover payment for the services it provided. In June 2006, partial summary judgment was entered in FCA's favor in the amount of \$1,332,874.40 ("FCA Judgment").

It is undisputed that at the May 14, 2004 meeting of NYCCC's stockholders the following were elected directors of NYCCC: Louis Okaingni-Okaingni, Angeline Kili, Firmin Kouakou, Alexandre Traoré, Serge-Philippe Bailly, Ahouna Gaston, Yalle Agbré, Cisse Locine, Hausmann-Alain Banet, and Evelyn Cudel. Mr. Locine passed away, leaving the board with nine members. The current make-up of the Board is disputed. Defendants maintain that FRC voted to remove Banet and Ms. Cudel from the Board on November 17, 2005. Plaintiffs deny this action occurred and state that Banet is, and has always been, a member of the Board. Plaintiffs argue that Banet has been unjustly excluded from taking part in Board

¹ Since I am denying plaintiffs' motion for summary judgment, and the legal standard for a motion for judgment on the pleadings concerns a similar standard as that of summary judgment where I must look at the facts in the light most favorable to the non-moving party, I will not specifically address plaintiffs' motion for judgment on the pleadings. For the same reason, I also do not reach a conclusion regarding defendants insinuation that plaintiffs LCM and Banet lack standing to bring this § 291 claim.

meetings and decisions. In addition, plaintiffs claim that no Board meetings have taken place since May 2004.

Of the remaining Board members, two (Kili and Kouakou) are currently incarcerated. Although plaintiffs allege that Mr. Agbre has been indicted and is fleeing justice, defendants adamantly deny this claim and insist that Mr. Agbre, as a United States citizen currently living in Georgia, is merely under investigation and has not been formally charged with any crime.

A dispute arose almost immediately as to who were the rightful equity owners of NYCCC. In 2005, FRC sued LCM seeking a determination of the parties' equity interests. In 2007, this Court found that LCM owned 20% of the 1,000 issued and outstanding NYCCC shares and that the FRC owned the remaining 80%.

In September 2007, the Superior Court of California for the County of San Francisco entered a judgment in favor of NYCCC and against Banet and LCM for \$606,299 for conversion of a tax refund check belonging to NYCCC. All appeals in that case failed. Seeking payment for the judgment, on May 23, 2008, NYCCC obtained LCM's 200 shares of NYCCC stock with a value of \$500,000. NYCCC maintains that Banet and LCM still owe it over \$100,000. At that time, FRC became the sole stockholder of NYCCC. Plaintiffs dispute this factual interpretation and maintain that LCM is still a shareholder of NYCCC.

On September 19, 2008, the President of the Côte d'Ivoire formed the Comité de Gestion de la Filière Café-Cacao ("CGFCC") to succeed to the assets, liabilities, rights and responsibilities of FRC. The President of Côte d'Ivoire established the structure of CGFCC and defined its duties and responsibilities. Since September 19, 2008, CGFCC has been the owner of all of NYCCC's outstanding stock.

In November 2008, the Vice-President of CGFCC, along with another member of the CGFCC, its Ivorian counsel, and two professionals from PricewaterhouseCoopers visited the NYCCC plant in Fulton, and met with the Production Manager, the Engineer, the HR/Compliance Manager, and Mr. Agbre. The group then met with NYCCC's corporate counsel, and counsel for the President of the Côte d'Ivoire in the United States, and reviewed the books and records of NYCCC.

On November 20, 2008, CGFCC removed all of the members of the Board and elected the following four directors as new members of the Board: Madame Donwahi, Madame Yapobi, Monsieur Célestin, and Monsieur Prosper. A completely new board of directors is now in place at NYCCC. One of the new Board's first acts of business was to remove all of the current officers of NYCCC and appoint Mike Malash as President and Pat Haney as Secretary/Treasurer.

Defendants maintain that as of December 3, 2008 and in addition to the FCA Judgment, NYCCC has accumulated \$341,151.33 in current debt. NYCCC has been in discussions with the CGFCC to obtain funds to cover the debts of NYCCC. As fruit of these negotiations, CGFCC has already sent NYCCC \$400,000 and has committed to provide sufficient funding to NYCCC to pay NYCCC's obligations. Plaintiffs contend that CGFCC will not provide sufficient funding to cover all of NYCCC's outstanding obligations and that NYCCC will probably fail to pay the FCA Judgment, notwithstanding any ability they may have to pay. NYCCC, however, has explicitly reiterated its intention to pay the FCA Judgment after it has received additional funds from CGFCC.

Contrary to plaintiffs' claim that LCM is a creditor of NYCCC, defendants vehemently deny that either LCM or Banet are creditors of NYCCC and specifically alleged that their indebted obligations either never existed or have been thereafter reimbursed.

II. ANALYSIS

A. *Procedural Legal Standard*

Judgment on the pleadings is appropriate under Court of Chancery Rule 12(c) where "there is no material fact in dispute and the moving party is entitled to judgment under the law."² The Court must draw all reasonable inferences and view the pleaded facts in the light most favorable to the nonmoving party.³ "The nonmoving party must therefore be accorded the same benefits as a plaintiff defending a motion under [Court of Chancery] Rule 12(b)(6)."⁴

² *In re Seneca Investments, Inc.*, C.A. No. 3624-CC, 2008 WL 4329230, at *2 (Del. Ch. Sept. 23, 2008) (quoting *Warner Commc'ns, Inc. v. Chris-Craft Indus. Inc.*, 583 A.2d 962, 965 (Del. Ch. 1989), *aff'd*, 567 A.2d 419 (Del. 1989)); *see also Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

³ *Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 338 (Del. Ch. 2008).

⁴ *In Re Seneca Investments, Inc.*, 2008 WL 4329230, at *2.

This Court may grant summary judgment where “the pleadings, depositions, answer to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”⁵ The Court views the facts in the “light most favorable to the nonmoving party, and the moving party has the burden of demonstrating that there is no material question of fact.”⁶ The nonmoving party, however, “must set forth specific facts showing that there remains a genuine issue for trial.”⁷ But all evidence offered by the non-moving party is still to be viewed in the light most favorable to the non-moving party. If, given this evidence, “a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way . . . summary judgment is inappropriate.”⁸

B. Appointment of a Receiver for NYCCC

It has long been settled that the appointment of a receiver lies within the sole discretion of the Court.⁹ Under § 291 “[w]henver a corporation shall be insolvent, the Court of Chancery may at any time appoint 1 or more persons to be receivers of and for the corporation.”¹⁰ The generally accepted principle, however, is that “a receiver will never be appointed except under special circumstances of great exigency and when some real beneficial purpose will be served thereby.”¹¹ Thus, the Court will exercise its discretion to appoint a receiver only where the corporation is insolvent and certain exigent circumstances indicate that such a remedy would be appropriate.¹²

⁵ *LaPoint v. AmerisourceBergen Corp.*, C.A. No. 327-CC, 2007 WL 1309398, at *4 (Del. Ch. May 1, 2007) (quoting Ct. Ch. R. 56(c)).

⁶ *LaPoint v. AmerisourceBergen Corp.*, C.A. No. 327-CC, 2007 WL 1309398, at *4 (Del. Ch. May 1, 2007) (quoting *Elite Cleaning Co. v. Capel*, C.A. No. 690-N, 2006 WL 1565161, at *3 (Del. Ch. June 2, 2006)).

⁷ *Id.*

⁸ *Acro Extrusion Corp. v. Cunningham*, 801 A.2d 345, 347 (Del. 2002).

⁹ See *Velcut Co. v. United States Wrench Mfg. Co.*, 141 A. 801 (1928) (discussing how the appointment of a receiver for an insolvent corporation is discretionary under § 291).

¹⁰ 8 Del. C. § 291.

¹¹ *Prod. Res. Group, LLC v. NCT Group, Inc.*, 863 A.2d 772, 784 (Del. Ch. 2004).

¹² See *Drob v. Nat'l Mem. Park*, 41 A.2d 589 (Del. Ch. 1945) (stating that a receiver should never be appointed except under special circumstances of great exigency); see also *Prod. Res. Group, LLC v. NCT Group, Inc.*, 863 A.2d 772 (Del. Ch. 2004) (appointing a receiver when it

The Court considers two separate tests in determining insolvency under § 291: (1) where liabilities exceed assets or (2) there is an inability to pay current obligations in the ordinary course of business.¹³ In addition, “insolvency is a jurisdictional fact, proof of which must be clear, convincing, and free from doubt. If there is any doubt as to the insolvency of the corporation, a receiver should not be appointed.”¹⁴ Here, plaintiffs fail on both counts to convince the Court that NYCCC is insolvent.

Plaintiffs face an uphill battle in their attempt to prove insolvency with such a thin record on summary judgment. The facts in the case are very much in dispute, and given the procedural posture, I must view those disputed facts in the light most favoring defendants.

On the first prong of the insolvency test, defendants maintain that the book value of NYCCC’s assets is \$5,195,102.04, which far exceeds their stated liabilities of \$1,980,040.99. This fact cannot, in this procedural context, be disputed. Such a positive advantage in assets compared to liabilities allows for better prospects in raising additional funds to meet current obligations.¹⁵ Thus, for purposes of summary judgment I must accept that NYCCC maintains a positive asset to liabilities ratio.

On the second prong of the insolvency test, plaintiffs fail to prove that NYCCC cannot pay its current obligations in the ordinary course of business. Proof of insolvency “must be clear and convincing and free from doubt.”¹⁶ Although plaintiffs allege that NYCCC cannot pay all of its obligations, including the FCA Judgment, defendants provide sufficient evidence to doubt plaintiffs’ assertion. CGFCC, a government agency, is the current equity owner of NYCCC. According to defendants, CGFCC has replaced NYCCC’s previously disreputable Board with four new members, replaced NYCCC’s management, and provided NYCCC with \$400,000 cash to pay down its obligations. Additionally, NYCCC

was necessary to protect the company’s creditors); *Noble v. European Mtg & Inv. Corp.*, 165 A. 157 (Del. Ch. 1933) (holding that a bare showing of insolvency alone will not result in appointment of a receiver).

¹³ *Prod. Res. Group, LLC v. NCT Group, Inc.*, 863 A.2d 772, 782 (Del. Ch. 2004).

¹⁴ *Banks v. Cristina Copper Mines, Inc.*, 99 A.2d 504, 505 (Del. Ch. 1953).

¹⁵ *Id.* at 782-83 (noting that a company with five-times greater assets than liabilities would be sufficiently credit worthy to raise additional money to help meet its obligations).

¹⁶ *Banks v. Cristina Copper Mines, Inc.*, 99 A.2d 504, 506 (Del. Ch. 1953).

has practically guaranteed forthcoming financial support from CGFCC that will be sufficient to meet most of its obligations, including the FCA Judgment. NYCCC maintains that the only debts for which funds are not committed are the debts, not judgments, claimed by FCA and LCM. NYCCC genuinely disputes those debts in their entirety and therefore, at this stage in the proceedings, is not required to produce sufficient funds to satisfy those debts. Given this new found financial stability derived from CGFCC, plaintiffs are unable to prove that NYCCC is insolvent. Therefore, I am unable to conclude that the facts, taken in the light most favorable to defendants, show that plaintiffs are entitled to judgment as matter of law.

Where a corporation is solvent, the Court of Chancery may still exercise its equity powers to appoint a receiver.¹⁷ The Court, however, must exercise this power with great restraint.¹⁸ This Court will only exercise its power to appoint a receiver upon a clear showing of “fraud, mismanagement or extreme circumstance causing imminent danger of great loss which cannot be otherwise prevented.”¹⁹ I cannot find any evidence in the record of any set of facts that would suggest that NYCCC faces an “imminent threat of great loss.” Plaintiffs, therefore, do not meet this high standard.

III. CONCLUSION

Given the procedural posture of this case and for the reasons set forth above, plaintiffs’ motion for summary judgment is DENIED. The parties to this lawsuit have a tortured history of disagreements and litigiousness, both in this Court and in other jurisdictions. All counsel have an obligation to their clients, but also to this Court, to assist them in achieving a business resolution, avoiding the unwholesome and unnecessary social costs that attend litigation by fractious parties with sharp axes to grind. A previous round in this match was both unwieldy and costly, with extensive motion practice and a cumbersome trial requiring interpreters and translations from French to English of myriad documents. Now, a scant two years after this Court’s earlier decision resolving the parties’ disagreement, it is déjà vu all over again. Nevertheless, if the parties believe yet another trial, with all its substantial costs given the cultural and linguistic differences, is the only solution, they are entitled to it. Trial is scheduled to commence on July 30, 2009 at 9:00

¹⁷ See *Carson v. Allegany Window Glass Co.*, 187 F. 791 (D. Del. 1911).

¹⁸ See *Vale v. Atlantic Coast & Inland Corp.*, 99 A.2d 396 (Del. Ch. 1953).

¹⁹ See *Id.* at 400.

___ in the Court of Chancery in Georgetown. All parties, their legal representatives, and all individuals purporting to represent the parties as officers, managers or directors, shall be present for the duration of the trial. There will be no exceptions to this attendance requirement. Each side to this dispute shall bear the costs equally of interpreters and translators. A pre-trial stipulation shall be filed with the Court on or before July 27, 2009, and a pre-trial conference is scheduled via telephone at 10:00 a.m. on July 29, 2009, to be initiated by plaintiffs. Plaintiffs' opening pre-trial brief is due by noon on July 10, defendants' answering brief is due by noon on July 17, and the reply brief by noon on July 20.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned above the printed name.

William B. Chandler III

WBCIII:tet