IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MEDI-TEC OF EGYPT CORP.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Consolidated C.A. No. 19760-NC
	)	
BAUSCH & LOMB SURGICAL, FRANCE, and BAUSCH & LOMB SURGICAL, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: November 21, 2003
Decided: March 4, 2004

Arthur G. Connolly, III and Christos T. Adamopoulos, of CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware, Attorneys for Plaintiff

Philip Trainer, Jr. and Carolyn S. Hake, of ASHBY & GEDDES, Wilmington, Delaware, Attorneys for Defendants

PARSONS, Vice Chancellor.

This is an action by Medi-Tec of Egypt Corp. ("Medi-Tec") alleging breach of contract and in the alternative requesting damages based on quantum meruit arising from an alleged oral contract with Defendants Bausch & Lomb Surgical, France and Bausch & Lomb, Inc. (collectively "BLS"). In addition, Count I of the Consolidated Amended Verified Complaint seeks a declaratory judgment that Bausch & Lomb Surgical, France is subject to personal jurisdiction in Delaware based upon principles of estoppel, alter ego and agency.

Defendants have filed a motion to dismiss for, among other things, lack of subject matter jurisdiction, lack of personal jurisdiction and failure to state a claim upon which relief can be granted. For the reasons stated below, the Court holds that it does have subject matter over this dispute, but will grant Defendants' motion to dismiss based on lack of personal jurisdiction and failure to state a claim. Because of the disposition of the latter issues, the Court does not reach the remaining issues raised by Defendants' motion to dismiss.

I. BACKGROUND

A. The Parties

Medi-Tec is and was at all relevant times an Egyptian corporation engaged in business as a distributor of medical and surgical products, with its principal place of business in Egypt.

Bausch & Lomb Surgical, Inc. ("BLS Inc."), is and was at all relevant times a Delaware corporation engaged in business as a marketer of Bausch & Lomb manufactured medical and surgical products with its head office in California.

Bausch & Lomb Surgical, France ("BLS France") is and was at all relevant times a French corporation engaged in the same business as BLS Inc. with its head office in France.

II. FACTS[1]

Medi-Tec alleges that in March of 1999 BLS appointed Medi-Tec as its exclusive distributor in Egypt. Subsequently, Medi-Tec expended substantial sums promoting, marketing and selling Baush & Lomb products in Egypt. BLS has received $407,000 as a result of Medi-Tec's sales efforts. Pursuant to the commission arrangement between the parties, Medi-Tec was entitled to receive $122,297.20 (30%) in commissions of which it has received only $73,464. Thereafter, in August 1999, BLS terminated its relationship with Medi-Tec. As a result, an Egyptian customer cancelled a pending order worth $151,200 in commissions to Medi-Tec. Medi-Tec also alleges that throughout the business relationship, BLS France and BLS Inc. "represented themselves as if each company was the alter ego and agent of the other."[2]

III. PRIOR PROCEEDINGS

On October 6, 2000, Medi-Tec filed an action in the Delaware Superior Court against BLS Inc. Medi-Tec subsequently filed an amended complaint naming BLS

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1 All facts are taken from the Consolidated Amended Verified Complaint ("Complaint" or "Compl.") unless otherwise indicated.

2 Compl. ¶ 5.

France as an additional defendant.[3] Medi-Tec asserted that the Superior Court had jurisdiction over BLS France based on theories of alter ego and jurisdiction by estoppel. In granting summary judgment, the Superior Court held that it did not have personal jurisdiction over BLS France. The court reasoned that the alter ego theory is an equitable theory unavailable in Superior Court, and that Medi-Tec failed to present sufficient evidence to support its contention that it relied on BLS France being a Delaware corporation.[4] Medi-Tec filed a motion for reargument and removal. The Superior Court denied reargument and granted Medi-Tec's motion to remove or transfer the action to the Court of Chancery pursuant to 10 *Del. C.* § 1902.[5]

Medi-Tec filed its Consolidated Amended Verified Complaint with this Court on November 25, 2002.[6] Defendants then filed a motion to dismiss for (i) lack of subject matter jurisdiction, (ii) lack of personal jurisdiction, (iii) improper venue, (iv) insufficiency of process, (v) insufficiency of service of process, and (vi) failure to state a

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3 *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical, Inc.*, C.A. No. 00C-10-65 JEB (Del. Super.) (the "Superior Court Action").

4 Defendants' Opening Brief in Support of Their Motion to Dismiss ("DOB") Exs. C and D at 28-29.

5 DOB Ex. F at 6-8; § 1902 provides "[n]o civil action, suit or other proceeding brought in any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter, either in the original proceeding or on appeal. Such proceeding may be transferred to an appropriate court for hearing and determination . . . ."

6 D.I. 15.

claim upon which relief can be granted. After briefing was completed, former Vice Chancellor Jacobs was appointed to the Supreme Court and the case was reassigned.

IV. STANDARD OF REVIEW

When considering a motion to dismiss under Court of Chancery Rule 12(b)(6), the court must assume the truthfulness of all well-pled facts in the complaint and view those facts and all reasonable inferences drawn from them in the light most favorable to the non moving party.[7] Conclusory allegations that are unsupported by facts contained in the complaint, or any documents integral to the complaint and incorporated by reference therein, will not be accepted as true.[8] Dismissal is appropriate under Rule 12(b)(6) only when it appears with reasonable certainty that the plaintiff would not be entitled to relief under any reasonable set of facts properly supported by the complaint and any integral documents incorporated by reference therein.[9]

Prior to discovery, the plaintiff need only make a prima facie showing of jurisdiction in order to survive a motion to dismiss.[10] Once jurisdictional discovery has been completed, however, "the plaintiff must allege specific facts supporting its

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7 *Anglo American Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 148-49 (Del. Ch. 2003).

8 *Id*.

9 *Id*.

10 *Sears Roebuck & Co. v. Sears*, 774 F. Supp. 1297, 1301 (D. Del. 1990).

position." The court may review and evaluate the entire record when deciding whether it may assert jurisdiction.[11]

V. DISCUSSION

A. Subject Matter Jurisdiction

In addressing the merits of BLS's motion to dismiss, the Court first must determine whether it has subject matter jurisdiction over this action. Medi-Tec alleges that the Court of Chancery has subject matter jurisdiction over Medi-Tec's Complaint pursuant to 10 *Del. C.* §§ 341 and 6501. BLS contends that the Court lacks subject matter jurisdiction because the Complaint seeks monetary damages for breach of contract and does not claim an equitable right or seek an equitable remedy.

Title 10, section 341, of the Delaware Code provides: "[t]he Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity." Thus the threshold question is whether Medi-Tec's cause of action seeking to hold BLS Inc. liable for the actions of BLS France by disregarding their separate legal identities states a matter or cause in equity.

A "cause in equity" arises when the plaintiff asserts an equitable right or seeks an equitable remedy. Here Medi-Tec seeks to "pierce the corporate veil" of BLS France to hold BLS Inc. liable for the actions and statements of BLS France and to establish personal jurisdiction over BLS France. While it is not necessarily clear under Delaware

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[11] *Id*.

law whether veil piercing is an equitable right or an equitable remedy,[12] it is clear that only the Court of Chancery has the equitable power to pierce the corporate veil.[13]

Just as the Court is not bound to accept an incantation of "magic words" as a basis of equitable jurisdiction, it is not bound to reject a pleading which seeks equitable relief because it is not artfully pled. The allegations of the Complaint, taken together with the rights to be protected and the remedies sought, ordinarily determine this Court's subject matter jurisdiction.[14] It is true that Medi-Tec's claim for declaratory relief pursuant to 10 *Del. C.* § 6501 provides no independent basis for equitable jurisdiction.[15] It is also true that an action for money damages for breach of contract generally presents a legal claim within the jurisdiction of the Superior Court.[16] The underlying relief sought in this

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[12] Donald J. Wolfe Jr. & Michael A. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery § 2-3[b] (2003). If veil piercing is an equitable right this Court has jurisdiction under 8 *Del. C.* § 341. If veil piercing is an equitable remedy, this Court only has jurisdiction if there is no adequate remedy at law. 8 *Del. C.* § 342. Because the Superior Court dismissed Medi-Tec's claim that BLS France was the alter ego of BLS Inc. for lack of subject matter jurisdiction, there is no adequate remedy at law. Equity will not suffer a wrong without a remedy. Thus, for purposes of this case, whether this veil piercing is an equitable right or an equitable remedy is a distinction without a difference.

[13] *See, e.g., John Julian Constr. Co. v. Monarch Builders, Inc.*, 324 A.2d 208, 210 n.1 (Del. 1974).

[14] *Hughes Tool Co. v. Fawcett Publ'ns, Inc.*, 297 A.2d 428, 431 (Del. Ch. 1972), *rev'd on other grounds*, 315 A.2d 577 (Del. 1974); *Heston v. Miller*, 1979 WL 174446, at *1 (Del. Ch. Oct. 11, 1979).

[15] *See, e.g., Clark v. Teevan Holding Co.*, 625 A.2d 869, 879 (Del. Ch. 1992); *Nash v. Dayton Superior Corp.*, 728 A.2d 59, 61 (Del. Ch. 1998).

[16] *See, e.g., Heston*, 1979 WL 174446, at *1.

case, however, is equitable in nature and only available in the Court of Chancery.[17] Medi-Tec's claim requesting this Court to use its equitable powers to pierce the corporate veil of BLS France to hold BLS Inc. liable for the actions of BLS France, falls within the Court's subject matter jurisdiction.[18]

Because the Court has subject matter jurisdiction over Count I, it also has jurisdiction over the remaining Counts under the "clean-up doctrine."[19] Defendants' motion to dismiss for lack of subject matter jurisdiction will be denied.

B. Personal Jurisdiction

Defendant BLS Inc. is a Delaware corporation and therefore subject to this Court's jurisdiction. Defendants moved to dismiss as to BLS France for lack of personal jurisdiction.

Medi-Tec argues that this Court has personal jurisdiction over BLS France on two alternative theories. First, Medi-Tec contends that BLS Inc. and BLS France are alter

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17 *Sonne v. Sacks*, 314 A.2d 194, 197 (Del. 1973); *John Julian*, 324 A.2d at 201 n.1.

18 BLS contends that *Star States Dev. Co. v. CLK, Inc.*, 1994 WL 233954, at *3 (Del. Super. May 10, 1994) rejected an argument that the Court of Chancery had subject matter jurisdiction where an equitable remedy of piercing the corporate veil was sought in a contract action. (DOB at 15-16). BLS misinterprets *Star States*. In *Star States*, the Superior Court simply noted that the Court of Chancery would not have jurisdiction over the action because plaintiff sought a determination of contract rights and *did not* seek to pierce the corporate veil. *Star States* did not hold that subject matter jurisdiction is not available in the Court of Chancery when a plaintiff seeks to pierce the corporate veil in an action on a contract. *See Star States*, 1994 WL 233954, at *3.

19 *E.g.*, *Getty Ref. Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 150, *aff'd*, 407 A.2d 533 (1979).

egos of one another, and thus, this Court has jurisdiction based on an alter ego and agency theory.[20] Second, Medi-Tec asserts that BLS France represented itself as a Delaware corporation, and that Medi-Tec relied on that representation to its detriment. Therefore, Medi-Tec claims this Court has personal jurisdiction under a "jurisdiction by estoppel" theory.[21] The Complaint seeks a declaration that BLS France is subject to personal jurisdiction in Delaware and damages for breach of contract, or alternatively in quantum meruit.[22]

1. Alter Ego Jurisdiction

Medi-Tec urges this Court to assert jurisdiction over BLS France because it was acting as the alter ego of BLS Inc. This theory requires a showing of two "critical elements":

> (1) that the out-of-state defendant over whom jurisdiction is sought has no real separate identity from a defendant over whom jurisdiction is clear based on actual domicile or satisfaction of Delaware's long-arm statute; and (2) the existence of acts in Delaware which can be fairly imputed to the out-of-state defendant and which satisfy the long-arm statute and/or federal due process requirements.[23]

First, Medi-Tec argues that BLS France and BLS Inc. operate as parts of a larger distribution network for Bausch & Lomb goods, and that therefore each is the alter ego of the other. Medi-Tec does not allege that BLS France and BLS Inc. shared resources or

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20 Compl. ¶¶ 20-21.

21 *Id. at* ¶¶ 19, 21.

22 *Id*. at ¶¶ 18-27.

23 *HMG/Courtland Props., Inc. v. Gray,* 729 A.2d 300, 308 (Del. Ch. 1999).

"operated in relevant part as one."[24] Medi-Tec has taken discovery on the jurisdictional issues.[25] Nevertheless, it has failed to come forward with specific facts to support its assertion of alter ego jurisdiction. Medi-Tec's conclusory allegations are insufficient to support the contention that BLS France has no separate identity from BLS Inc. as required by the first prong of the test.

As for the second prong, Defendants argue that BLS France is not subject to personal jurisdiction under Delaware's long arm statute, and thus Medi-Tec's claim of alter ego jurisdiction must fail. Medi-Tec cites *Haisfield v. Cruver* for the proposition that "alter ego jurisdiction can attach even where the alter ego conduct took place out of state, provided that one of the parties has sufficient Delaware contacts."[26] But *Haisfield* did not abrogate the minimum contacts requirement of due process. Rather, *Haisfield* suggests that a Court may exercise personal jurisdiction over a non-resident defendant pursuant to § 3104(c)(1) on the basis of a *single act* within Delaware if the act forms the

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[24] *See Haisfield v. Cruver*, 1994 WL 497868, at *3-4 (Del. Ch. Aug. 25, 1994)(finding that the plaintiff had plead facts sufficient to suggest that "the separate existence of the [parent and subsidiary] should be disregarded," where the defendants had a significant financial interest in the companies, were officers and directors of both companies, both companies shared the same addresses and phone numbers and the defendants "represented EcoLease Corporation, a non-existent corporate entity related to EcoVault, to be a subsidiary of Unisil.")

[25] Because Medi-Tec has had discovery on the jurisdictional issues, and because the Court relies on documents outside the pleadings, the Court may treat Defendants' motion to dismiss as a motion for summary judgment pursuant to Court of Chancery Rule 12(e).

[26] Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss ("PAB") at 12.

basis for the cause of action.[27] Medi-Tec simply does not allege that BLS France's alleged breach of contract arose out of any act within the state of Delaware or any contact that BLS Inc. might have had with the state of Delaware.[28]

Medi-Tec's alter ego argument also fails because it has not alleged that the corporate form in and of itself operates to serve some fraud or injustice, distinct from the alleged wrongs of BLS France.[29] BLS France's misrepresentations do not provide a sufficient basis for the Court to pierce the corporate veil. Allegations of breach of contract by a subsidiary do not suffice to supply the necessary fraud or injustice to hold the subsidiary to be the alter ego of the parent, especially where there is no evidence of wrong-doing by the parent.[30] Medi-Tec remains free, of course, to seek redress against BLS France in France or another appropriate forum.

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[27] Emphasis added. 10 *Del. C.* § 3104(c)(1) provides "(c) As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent: (1) Transacts any business or performs any character of work or service in the State . . ."; *Haisfield*, 1994 WL 497868, at *4.

[28] *See IM2 Merch. & Mfg., Inc. v. Tirex Corp.*, 2000 WL 1664168, at *4 (Del. Ch. Nov. 2, 2000) (holding that where plaintiff admitted that none of the conduct at issue took place in Delaware, the mere fact that the parent is incorporated in Delaware is insufficient to confer jurisdiction over a non-Delaware subsidiary).

[29] As discussed *infra*, at pp. 18-19, despite having had the benefit of discovery, Medi-Tec has failed to adduce any evidence that BLS Inc. made any of the alleged misrepresentations about the involvement of a United States corporation.

[30] *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del. 1989)("Any breach of contract and any tort -- such as patent infringement -- is, in some sense, an injustice. Obviously this type of 'injustice' is not what is contemplated by the

Similarly, any argument that this Court has jurisdiction over BLS France under an agency theory must fail. Medi-Tec failed to show that BLS Inc. performed any of the jurisdictional activities delineated in § 3104(c)(4) as BLS France's general agent. For instance, Medi-Tec did not allege that BLS Inc. caused tortious injury in Delaware, or engaged in a persistent course of conduct in Delaware, or derived substantial revenue from services or things used in the state of Delaware. Medi-Tec has not established jurisdiction under an agency theory.[31]

2. Jurisdiction by Estoppel

Medi-Tec also relies on the doctrine of estoppel to support personal jurisdiction over BLS France. Defendants argue that Medi-Tec is collaterally estopped from asserting personal jurisdiction based on a theory of estoppel by the Superior Court's ruling on that issue. Collateral estoppel "precludes the relitigation of a factual issue

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common law rule that piercing the corporate veil is appropriate only upon a showing of fraud or something like fraud. The underlying cause of action does not supply the necessary fraud or injustice. To hold otherwise would render the fraud or injustice element meaningless, and would sanction bootstrapping.").

[31] 10 *Del C.* § 3104(c)(4) ("court may assert jurisdiction over a plaintiff who causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State"); *Chaplake Holdings Ltd. v. Chrysler Corp.*, 1995 WL 653510, at *5 (Del. Super. Aug. 11, 1995)(court cannot assert personal jurisdiction pursuant to § 3104(c)(4) where "plaintiffs have failed to make any assertions -- much less a prima facie showing -- that either Chrysler or Lamborghini U.S.A. ever acted as Lamborghini's general agent in Delaware").

which was litigated and decided in the prior suit between the same parties or persons in privity with them."[32] The doctrine applies when,

> (1) The issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.[33]

The record in this case demonstrates that the elements of collateral estoppel are satisfied.

Medi-Tec contends that the first element cannot be satisfied as the Superior Court "did not decide that jurisdiction by estoppel cannot be established here -- it only determined that the record at the time failed to demonstrate reliance."[34] The Superior Court, however, specifically addressed Medi-Tec's jurisdiction by estoppel argument. After rejecting Medi-Tec's attempt to assert personal jurisdiction over BLS France based on the alter ego doctrine, the court held:

> [T]he plaintiff has simply failed to come forward with any affidavits or other evidence in the record that its client relied on the French corporation being a Delaware corporation before it entered into any dealings with it, so the record is plainly insufficient to support that claim, and the motion for summary judgment on jurisdictional grounds relating to Bausch and Lomb Surgical, France…will be granted.[35]

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[32] *Steinman v. Levine*, 2002 WL 31761252, at *11 (Del. Ch. Nov. 27, 2002), citing *Kohls v. Kenetech Corp*., 791 A.2d 763, 767 (Del. Ch. 2000).

[33] *Betts v. Townsends*, 765 A.2d 531, 535 (Del. 2000).

[34] PAB at 11.

[35] DOB Ex. D at 29.

The Superior Court therefore did address the jurisdiction by estoppel theory and granted summary judgment in favor of Defendants on it.

In arguing that the first element of collateral estoppel cannot be satisfied, Medi-Tec complains that the Superior Court "chose not to acknowledge" the affidavit of Nabil Megally that Medi-Tec submitted with its motion for reargument. The Superior Court found that "the late submitted affidavit is not particularly persuasive since it seems, number one, it comes after the court ruled, and, number two, simply asserts conclusions that are not backed up . . . ."[36] The Superior Court considered the evidence in support of the identical issue presented here, and granted summary judgment denying jurisdiction by estoppel. Any argument that the Superior Court failed adequately to consider evidence should be taken up on appeal from that decision. There is no basis for Medi-Tec to relitigate that same issue in this Court.

There is no dispute that both the second and the third elements of collateral estoppel are satisfied as there was a final judgment on the merits against the same party that seeks to bring the identical issue here.[37] Finally, Medi-Tec does not contend or point to any facts that would support a finding that it did not have a full and fair opportunity to litigate the issue of jurisdiction by estoppel in the Superior Court Action. In fact, the

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[36] DOB Ex. F at 7.

[37] While a judgment based on a lack of personal jurisdiction does not operate as an adjudication of the merits of the underlying claim, it does preclude relitigation of the specific issue of jurisdiction. *See Baris v. Sulpicio Lines, Inc.*, 74 F.3d 567, 571 (5th Cir. 1996) citing 18 Charles Alan Wright, et al., *Federal Practice and Procedure* § 4436 (1981).

record indicates the contrary.[38] Therefore, collateral estoppel bars relitigation of the jurisdiction by estoppel issue in this Court.

Even if Medi-Tec's assertion of jurisdiction by estoppel were not barred by collateral estoppel, a serious question would exist as to whether that doctrine would be recognized under Delaware law. Plaintiff cites a single New York case, *Farmingdale Steer-Inn, Inc. v. Steer Inn Realty Corp.*, for the proposition that where a corporation holds itself out as being domiciled in a jurisdiction, courts in other jurisdictions have held that the corporation is subject to jurisdiction there by estoppel.[39] Prior to that case, one New York court declared that the doctrine of jurisdiction by estoppel was not a recognized doctrine in New York, and subsequent cases have held the same, one court going so far as to dismiss *Farmingdale* as "sport."[40] While *Farmingdale* does support

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38 *Cf. Zimmerman v. Home Shopping Network*, 1989 WL 102488, at *4 (Del. Ch. Aug. 3, 1989).

39 274 N.Y.S.2d 379, 380 (N.Y. Sup. Ct. 1966)(stating that "[d]efendant represented to the plaintiff and the plaintiff entered into the agreement believing that it was dealing with a corporation authorized to do business in this State. Equity will not permit a party to take advantage of its own wrongs.").

40 *See Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321 (2d Cir. 1964)(surveying New York law and concluding that the state does not recognize jurisdiction by estoppel); *Howard v. Klynveld Peat Marwick Goerdeler*, 173 F.3d 844, 1999 WL 265022 (2d Cir. 1999), *aff'g* 997 F. Supp. 654, 663 (S.D.N.Y. 1997); *Pfaff American Sales Corp. v. M.V. Tadeusz Kosciuszko*, No. 82 Civ. 7659, 1984 WL 1333, at *2 (S.D.N.Y. Dec. 13, 1984); *see First American Corp. v. Price Waterhouse, LLP*, 988 F. Supp. 353, 360 (S.D.N.Y. 1997)(discussing the conflict between these cases and calling for a higher court to rule on the issue).

Medi-Tec's argument, the conflict evidenced by these cases undermines its persuasiveness.

Medi-Tec also contends that *A.A.R. Realty Corp. v. U.S. Fire Ins. Co.* suggests that Delaware courts might confer personal jurisdiction by estoppel under certain circumstances.[41] In *A.A.R. Realty*, the plaintiff argued that the court should assert jurisdiction over the defendant insurance broker because the defendant represented that it could procure insurance for the plaintiff in Delaware. In particular, because defendant "represented that it was a national organization authorized to do business in and write insurance in the state of Delaware," plaintiff argued that it should be subject to service of process here. The court declined to exercise personal jurisdiction stating that there was "no evidence…that the defendant intended to waive its right to avoid improper service of process."[42] The court explained that even if the plaintiff had relied on what it thought to be a right to sue the defendant in Delaware, such reliance was "misplaced" as the defendant could "do the business the plaintiff called on it to do without being subject to process in each state where the insurer obtained by the plaintiff [broker] covered risks."[43]

As the issue is barred by collateral estoppel, this Court need not decide whether Delaware would recognize the doctrine of jurisdiction by estoppel. Even assuming arguendo that Delaware would recognize jurisdiction by estoppel, however, the facts

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41 335 A.2d 271, 276 (Del. Super. 1975).

42 *Id.*

43 *Id.*

presented in this case do not support a reasonable inference that BLS France intended to make itself amenable to service of process in Delaware.[44]

In *Farmingdale*, the defendant represented in a written agreement that "it ha[d] filed a certificate of doing business in the State of N.Y. with the Secretary of State." The plaintiff argued that it "relied upon this representation in entering into the agreement and that its purpose was to avoid the hardship and expense of 'out-of-state litigation' and that by virtue thereof the defendant has in fact submitted itself to the jurisdiction of [New York] and should be estopped from denying it."[45] Medi-Tec argues that BLS France represented itself as a Delaware corporation through oral communications and a statement in an unsigned draft agreement and that Medi-Tec "entered into its business relationship with Bausch and Lomb in reliance upon these representations."[46]

In contrast to *Farmingdale*, the agreement offered as evidence here is a draft that was never signed. Medi-Tec alleges that the controlling contract is an oral agreement. In addition, the draft agreement provided that it was to be governed by Netherlands' law and

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[44] Medi-Tec argues that the holding in *A.A.R. Realty* suggests that "if the representation had been one that supported justifiable reliance upon the plaintiff's amenability," the defendant would have been subject to the court's jurisdiction. PAB at 14-15. This construction of the *A.A.R. Realty* holding ignores the court's emphasis on the lack of evidence of defendant's *intent* to waive the right to due process. 335 A.2d at 276.

[45] 274 N.Y.S.2d at 380.

[46] Compl. ¶ 19.

any disputes would be settled by arbitration at the Hague.[47] BLS contends that this clause should negate Medi-Tec's allegedly justifiable reliance on the first paragraph of the draft agreement as reflecting a French company's willingness to be sued in Delaware. In other words, even if the reference in the *draft* agreement to BLS France being a Delaware corporation was intentional and not inadvertent, the reasonableness of Medi-Tec's reliance on it is questionable in light of the foreign arbitration clause.

Furthermore, the Megally affidavit[48] states that Medi-Tec relied on the understanding that "it was conducting business with a single corporate entity…a United States corporation," and "considered the availability of the protection of the courts of the United States in reaching its decision to enter into a business relationship with the defendants."[49] This argument is not persuasive as the affidavit does not indicate that Defendants relied on being able to bring suit in the state of Delaware, specifically.[50]

Medi-Tec also has failed to establish reliance sufficient to give rise to a claim of estoppel. Medi-Tec alleges it relied both on the statement in the unsigned draft agreement and on oral representations made by BLS France representatives that BLS France is a Delaware corporation.[51] Lack of knowledge of a fact, and lack of means to

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47 Compl. Ex. A at § 15.1.

48 Aff. of Nabil Megally, Compl. Ex. C.

49 Compl. Ex. C at ¶¶ 2, 4.

50 *Cf. Farmingdale*, 274 N.Y.S.2d at 380 (defendant alleged it relied on being able to bring suit in the state of New York).

51 *See* Compl. Ex. A at 1; PAB Ex. A at 5.

obtain that knowledge are essential elements of an estoppel claim.[52] BLS argues that "Medi-Tec cannot allege that it lacked the means to obtain knowledge that Bausch & Lomb Surgical, France was not a Delaware corporation, as such information is public."[53] Medi-Tec does not deny that information was publicly available.

Based on the minimal evidence presented by Medi-Tec after a full opportunity to conduct jurisdictional discovery, the Court concludes that no reasonable factfinder could conclude that BLS France intentionally held itself out as being subject to jurisdiction in Delaware and that Medi-Tec reasonably relied on that fact to its detriment. Accordingly, even if Delaware were to recognize jurisdiction by estoppel, that doctrine would not provide a basis for this Court to assert personal jurisdiction over BLS France.

C. Complaint Fails to State a Claim Upon Which Relief Can Be Granted

1. Failure to State a Claim Against BLS Inc.

Defendants argue that claims against BLS Inc. should be dismissed because that entity was not a party to the alleged agreement, all business dealings and negotiations were between Medi-Tec and BLS France, and an ownership interest is insufficient to render a parent company liable for its subsidiary's breach of contract.[54]

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52 *Mabon, Nugent & Co. v. Texas Am. Energy Corp.*, 1990 WL 44267, at *5 (Del. Ch. Apr. 12, 1990).

53 DOB at 14.

54 DOB at 16.

Medi-Tec argues that its claims against BLS Inc. are based on disregard of the corporate entity, under which BLS Inc. should be held liable for BLS France's alleged breach of contract.[55] For this Court to pierce the corporate veil or hold that BLS Inc. is the alter ego of BLS France, Medi-Tec must prove that some "fraud or injustice" would be perpetrated through misuse of the corporate form.[56] Medi-Tec argues that the alleged breach of contract and misrepresentations by Defendants that the company Medi-Tec dealt with before it entered into the contract was an American company are sufficient to meet this requirement. To support piercing the corporate veil, however, the fraud or injustice must consist of something more than the alleged wrong in the complaint and relate to a misuse of the corporate structure.[57]

Medi-Tec does not plead any facts that Delaware courts traditionally rely upon as support for piercing the corporate veil. Instead, it relies exclusively on allegations that BLS Inc. and BLS France represented themselves as the same entity, and that a failure to pierce the veil would be unjust. The Court has addressed this argument in Part V.B.1,

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55 Medi-Tec concedes that it did not deal directly with BLS Inc. PAB at 7. As BLS Inc. is not a party to the alleged oral agreement, Medi-Tec does not have a contract claim against BLS Inc. absent its alter ego theory. *See Wallace v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999)("It is a general principle of contract law that only a party to a contract may be sued for breach of that contract.")

56 *Mobil Oil Corp.*, 718 F. Supp. at 265-68 (holding that under Delaware law "fraud or something like it" is required to prove a claim of alter ego).

57 *Id*. (a breach of contract or a tort, such as patent infringement, is not sufficient to meet the requirement of "fraud or injustice"); *see supra* at 11 & n.30.

supra. For similar reasons, Medi-Tec cannot succeed on its claim that the corporate veil of BLS France should be pierced to hold BLS Inc. liable for breach of contract.[58]

The evidence presented by Medi-Tec and Defendants indicates that all of the alleged misrepresentations as to corporate structure were made by BLS France.[59] Medi-Tec has failed to present any evidence that BLS Inc. had any dealings with Medi-Tec before it commenced litigation. In several detailed interrogatories, Defendants asked Medi-Tec to be "specific as to which actions were taken by Bausch & Lomb France and which actions were taken by Baush & Lomb U.S." (*i.e.*, BLS Inc.) in connection with a number of the specific allegations in the Complaint.[60] All of Medi-Tec's answers mentioned actions or statements by BLS France, but none of them alleged any actions or misrepresentations by BLS Inc.[61] The Answer to subpart (a) of Interrogatory 3, for example, states:

> Throughout negotiations with Bausch & Lomb Surgical France in March of 1999, Medi-Tec was induced to believe by Bausch & Lomb Surgical France's words and actions, that Bausch & Lomb Surgical France was a Delaware corporation. Medi-Tec justifiably relied on the foregoing in deciding whether to enter into an agreement with Bausch & Lomb Surgical France making Medi-Tec Bausch & Lomb Surgical France's exclusive

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58 *See supra* text accompanying n.24.

59 Both parties referred to evidence outside the Complaint in connection with Defendants' motion to dismiss. Accordingly, the Court will treat Defendants' motion under Rule 12(b)(6) as one for summary judgment and evaluate it under Rule 56.

60 *See* Plaintiff's Answers to Defendants' First Set of Interrogatories in the Superior Court Action ("Pl. Int. Ans.") attached to DOB as Ex. G, at Int. Nos. 3-19, 21-26.

61 *See* Pl. Int. Ans. 3-19, 21-26 at DOB Ex. G.

> distributor in Egypt. Bausch & Lomb Surgical France represented and warranted that it was a Delaware corporation when it identified itself as such in the draft contract that it prepared and furnished to Medi-Tec in or about November-December 1999.

These allegations might support a misrepresentation or other claim against BLS France. They do not, however, support an inference that the corporate structure of BLS Inc., formed in 1986 well before BLS France's first contact with Medi-Tec,[62] is fraudulent or a misuse.

Thus, even taking the facts in the light most favorable to Plaintiff and drawing all inferences in its favor, Medi-Tec has failed to present facts from which the Court could conclude that BLS Inc. is liable to Medi-Tec under any of the counts of the Complaint. The claim against BLS Inc. will be dismissed pursuant to Rule 12(b)(6).

VI. CONCLUSION

This Court has subject matter jurisdiction over the Complaint based on Medi-Tec's claim to pierce the corporate veil. After considering the record, the Court concludes that Medi-Tec has failed to allege facts that would allow the Court to assert personal jurisdiction over BLS France. First, Medi-Tec has failed to establish that BLS France and BLS Inc. operated as a single entity; therefore the claim of alter ego jurisdiction must fail. Second, as Medi-Tec had a full and fair opportunity to litigate the issue of jurisdiction by estoppel in Superior Court and lost, collateral estoppel bars relitigation of that issue in this Court. Even if collateral estoppel did not bar a finding of

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62 *See* DOB Ex. H.

jurisdiction by estoppel, the record provides no basis from which the Court could conclude that BLS France was subject to personal jurisdiction in Delaware by estoppel. Therefore, this Court cannot assert personal jurisdiction over BLS France. Furthermore, Medi-Tec has failed to allege facts that would support piercing the corporate veil of BLS France to hold BLS Inc. liable for BLS France's actions. Therefore, the Complaint against BLS Inc. will be dismissed for failure to state a claim upon which relief can be granted.

An appropriate Order will be entered.