

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AVETA, INC., MMM HOLDINGS, INC.,)
and PREFERRED MEDICARE CHOICE,)
INC.,)
)
Plaintiffs,) C.A. No. 07C-11-119 MMJ
)
v.)
)
CARLOS LUGO OLIVIERI and)
ANTONIO MARRERO,)
)
Defendants.)

Submitted: August 18, 2008
Decided: September 10, 2008

Upon Motion for Certification of Interlocutory Appeal of Defendants
Carlos Lugo Olivieri and Antonio Marrero.

DENIED.

ORDER

Richard L. Horwitz, Esquire, Brian C. Ralston, Esquire, Kirsten A. Zeberkiewicz,
Esquire, Berton W. Ashman, Jr., Esquire, Potter Anderson & Corroon LLP,
Wilmington, Delaware, Attorneys for Plaintiffs

Richard L. Renck, Esquire, Andrew D. Cordo, Esquire, Ashby & Geddes,
Wilmington, Delaware, Attorneys for Defendants

JOHNSTON, J.

1. By Opinion dated July 28, 2008, the Court denied the Motion to Dismiss of defendants Carlos Lugo Olivieri and Antonio Marrero. The motion alleged lack of personal jurisdiction and *forum non conveniens*. The Court held that the sharply-disputed issue of jurisdiction, when viewed in the light most favorable to the non-moving party, was governed by the parties' Purchase Agreement. The Purchase Agreement contains a choice of forum clause which specifically states that "each of the parties irrevocably submits to the exclusive jurisdiction of [Delaware] courts." Thus, the Court found that the parties had agreed that Delaware may exercise personal jurisdiction. Additionally, the Court held that litigation in Delaware would not cause overwhelming hardship to either party. Specifically, the Court found Delaware to be a proper forum because certain aspects of Delaware substantive law govern, the relevant evidence and witnesses are located within both the United States and Puerto Rico, the documentary evidence is in English, and the underlying issues do not implicate Puerto Rican public policy issues.

2. Defendants have applied pursuant to Supreme Court Rule 42 for an order certifying an appeal to the Delaware Supreme Court. The determination of whether to certify an interlocutory order lies within the discretion of the reviewing

court and is analyzed under the criteria set forth in Supreme Court Rule 42(b).¹

Rule 42(b) provides that interlocutory appeals will not be certified unless the reviewing court finds that the order: (1) determines a substantial issue; (2) establishes a legal right; and (3) meets one of the five enumerated criteria.²

Defendants assert that the Court's order denying their motion to dismiss for lack of personal jurisdiction and *forum non conveniens* determined a substantial issue, established legal rights, sustained controverted jurisdiction, and review could terminate the litigation.

3. The Court agrees that its decision sustained controverted jurisdiction.

Nevertheless, "denial of a motion to dismiss a complaint is an interlocutory order and, as such, is not appealable unless it has determined substantial legal rights."³

¹ See, e.g., *Tortuga Cas. Co. v. Nat'l Fire Ins. Co. of Pittsburgh*, 1991 WL 247813, at *2 (Del.); *State v. Superior Court*, 141 A.2d 468, 471 (Del. 1958).

² Supreme Court Rule 42(b) provides:

(i) Same as Certified Question. Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or

(ii) Controverted Jurisdiction. The interlocutory order sustained the controverted jurisdiction of the trial court; or

(iii) Substantial Issue. An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or

(iv) Prior Judgment Opened. The interlocutory order has vacated or opened a judgment of the trial court; or

(v) Case Dispositive Issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

³ *Sheppard v. State Dep't of Health and Soc. Servs.*, 2004 WL 1195387, at *3 (Del. Super.) (quoting *Wilmington Med. Ctr., Inc. v. Coleman*, 298 A.2d 320, 322 (Del. 1972)).

The Delaware Supreme Court has held that denial of a motion to dismiss for lack of personal jurisdiction does not establish a legal right or determine a substantial issue, as those terms have been construed under Rule 42.⁴

4. Delaware courts occasionally have found that *forum non conveniens* decisions determine substantial issues and establish legal rights.⁵ However, absent exceptional circumstances, the Supreme Court has refused to accept interlocutory appeals from *forum non conveniens* decisions.⁶ The Court finds that defendants have failed to demonstrate the existence of exceptional circumstances in this case.

THEREFORE, defendants, having failed to demonstrate that Delaware Supreme Court Rule 42(b) criteria apply and exceptional circumstances exist to warrant certification, the Motion for Certification of Interlocutory Appeal is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston

⁴ See *Tortuga Cas. Co.*, 1991 WL 247813, at *1-2; *Jelin v. NRG Barriers, Inc.*, 1996 WL 442907, at *1 (Del.).

⁵ *States Marine Lines v. Domingo*, 269 A.2d 223, 225 (Del. 1970) (plaintiff's right to choose the forum and the defendant's right to defend in a proper forum).

⁶ *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2861717, at *2 (Del. Ch.).