

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AEROGLOBAL CAPITAL)
MANAGEMENT, LLC,)
)
Plaintiff,)
)
v.) C. A. No. 01C-08-089 (CHT)
)
CIRRUS INDUSTRIES, INC.,) NON-ARBITRATION
et al)
) JURY TRIAL DEMANDED
Defendant.)

AMENDED OPINION AND ORDER

**On the Motions of Defendants Atalla,
Griffith, Midon, and Wood to Dismiss
Pursuant to Superior Court Rule 12(b)(2)**

Submitted: July 14, 2002
Decided: January 2, 2003
Amended: January 6, 2003
(Cover Page)

Rick S. Miller, Esquire, FERRY & JOSEPH, P.A. 824 Market Street, Suite 904, Wilmington, DE 19801; Timothy C. Russell, Esquire, and Michael Wagner, Esquire, SPECTOR, GADON & ROSEN, P.C., 1635 Market Street, 7th Floor, Philadelphia, PA 19103, Attorneys for the Plaintiff.

William O. LaMotte, III, Esquire, Jessica Zeldin, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL, 1201 N. Market Street, P.O. Box 1347, Wilmington, DE 19899-1347; and Michael R. Smith, Esquire, John P. Brumbaugh, Esquire, Michael A. Sexton, Esquire, KING & SPALDING, 191 Peachtree Street, Atlanta, GA 30303, Attorneys for the Defendants

TOLIVER, JUDGE

NATURE AND STAGE OF THE PROCEEDINGS

The instant litigation arises out of a complaint action filed by the Plaintiff, AeroGlobal Capital Management, LLC (hereinafter "AeroGlobal") against Cirrus Industries, Inc. (hereinafter "Cirrus"), Cirrus Holding Company Limited (hereinafter "CHCL"), Crescent Capital Investments, Inc. (hereinafter "Crescent"),¹ Sima Griffith,² and three former Cirrus directors, Marwan Atalla, William J. Midon, and William C. Wood, Jr.³ AeroGlobal's complaint, filed on August 9, 2001, alleges that the above named defendants tortiously interfered with a contract and prospective business relations between AeroGlobal and Cirrus.

Defendants Atalla, Griffith, Midon and Wood filed the

¹ Cirrus and Crescent were incorporated in Delaware and are therefore considered as "Delaware corporations". CHCL is a corporation formed under the laws of the Cayman Islands.

² Ms. Griffith, all times relevant to this action, was an employee of Aethlon Capital Corporation which brokered both agreements regarding the sale of the stock in question between CHCL/Crescent and Cirrus referred to *infra* pp. 2-3. She resides in the State of Minnesota and has had no contact with Delaware.

³ None of the former directors resided or did business in the State of Delaware. Mr. Atalla lives in Texas while Mr. Midon and Mr. Wood are residents of the States of Massachusetts and Alabama respectively.

present motions to dismiss based on a lack of personal jurisdiction, pursuant to Superior Court Civil Rule 12(b)(2) on September 28, 2001.⁴ AeroGlobal filed its initial response on November 9, 2001. Supplemental briefing having been ordered and completed, that which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS

The underlying facts of this case are not complicated or in substantial dispute. In June of 2001, Cirrus was in negotiations with two prospective buyers of Cirrus stock, AeroGlobal and CHCL. On June 7, 2001, Cirrus and CHCL entered into a purchase agreement for the sale of a majority, sixty-one percent (61%), of that stock. Ten days

⁴ Because there are no substantive differences regarding their status for present purposes, Ms. Griffith and Messrs. Atalla, Midon and Wood shall hereinafter be referred to collectively as the "Individual Defendants". Similarly situated are the motion jointly filed by Defendants Atalla, Midon and Wood, and the motion filed by Defendant Griffith. For the same reasons, they shall be considered as one unless otherwise noted.

later, Cirrus entered into a letter of intent with AeroGlobal which provided for the sale of thirty-five percent (35%) of the Cirrus stock to AeroGlobal. Cirrus's Board of Directors then terminated the agreement with CHCL. There are no contentions that any of these events took place in the State of Delaware, that any of the corporations did business here, or that any of those involved had a presence in Delaware in any manner or form.

The next move was made by CHCL on June 27, 2001 when it filed suit in the Court of Chancery of this state seeking a preliminary injunction to stop the sale of the aforementioned Cirrus stock to AeroGlobal. CHCL alleged that Cirrus's decision to approve AeroGlobal's proposal after it had agreed to sell the stock in question to CHCL was a breach of its contract with Cirrus. Vice Chancellor Lamb denied the injunction on July 19, 2001.⁵

⁵ Cirrus Holding Co. v. Cirrus Industries, 794 A.2d 1191 (Del. Ch. 2001). Vice Chancellor Lamb found that CHCL had failed to sustain its burden of showing that it would ultimately be successful at trial.

CHCL resumed communications with Cirrus with respect to the sale of the Cirrus stock previously contemplated just before Vice Chancellor Lamb issued his decision. Those discussions bore fruit on July 30, 2001 when the Board of Cirrus approved of the sale of the stock to CHCL for the second time. However, the sale was consummated at a price higher than that called for under the terms of the original CHCL/Cirrus agreement entered into on June 7, 2001.

On August 9, 2001, AeroGlobal instituted the instant litigation in this Court. Among other things, it claims that the resumption of communications between Cirrus and CHCL constituted a breach of, and tortious interference with, the initial agreement between AeroGlobal and Cirrus.⁶ AeroGlobal also alleged that unbeknownst to AeroGlobal, the Individual Defendants were part of the conspiracy, along with CHCL and Cirrus, the purpose of which was to "torpedo" the AeroGlobal/Cirrus deal.

⁶ As set forth in the letter of intent entered into by AeroGlobal and Cirrus on June 17, 2001.

The Parties' Contentions

The Individual Directors' Motion to Dismiss

The Individual Defendants move for dismissal claiming that the Court lacks jurisdiction over them for purposes of the instant litigation. In support of their motion the movants advance three arguments.

First, they claim that their status⁷ as former directors of Cirrus,⁸ notwithstanding the situs of its incorporation, is insufficient to subject them to personal jurisdiction under Delaware's long arm statute, 10 Del. C. §3104. That statute states, in relevant part:

(b) The following acts constitute legal presence within the State. Any person who commits any of the acts hereinafter enumerated thereby submits himself to the jurisdiction of the Delaware courts and is deemed thereby to have appointed and constituted the Secretary of State of this State his agent for the acceptance

⁷ Although Defendant Griffith was not a director of Cirrus, she adopts the arguments of the other Defendants in their entirety, save those advanced regarding jurisdiction based on directorship.

⁸ The Individual Defendants, again with the exception of Defendant Griffith, resigned from Cirrus on August 21, 2001. Defs.' Mot. to Dismiss at 1.

of legal process in any civil action against such nonresident person arising from the following enumerated acts.

(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;

. . . .

(3) Causes tortious injury in the State by an act or omission in this State;

The Individual Defendants argue that serving as a director of a Delaware corporation does not constitute doing business within the State for purposes of §3104(c)(1)⁹. They deny as well that they have solicited, transacted or contracted to perform any other relevant manner of business in the State of Delaware. Finally, they deny having

⁹ The Individual Defendants cite Carlton Inv. v. TLC Beatrice, Del. Ch., C.A. No. 13950, slip. Op. at 2-5, Allen, C. (Oct. 16, 1996), and Resource Ventures v. Resources Mgt., 42 F. Supp. 2d 423, 434 (D. Del. 1993).

committed any act or omission in this state, including, but not limited to, tortious injury.

Second, the Individual Defendants contend that they are similarly not subject to personal jurisdiction in the Delaware courts under 10 Del. C. §3114.¹⁰ More specifically, since AeroGlobal has not alleged that the Individual Defendants breached any fiduciary duty, its claims against them cannot be characterized as causes of action arising out of their roles as directors. If AeroGlobal's claims are not raised under §3114, then §3114 jurisdiction cannot be used to confer jurisdiction over the Individual Defendants.¹¹

Finally, the Individual Defendants claim that the exercise of personal jurisdiction over them in Delaware would violate due process because it offends traditional

¹⁰ Ten Del. C. §3114 addresses the service of process on non-resident directors and their implied consent for their agents in Delaware to receive service on their behalf. The Individual Defendants point out that this statute has been interpreted to mean that a non-resident director is subject to personal jurisdiction only in the enforcement of their fiduciary duties to their Delaware corporation and its shareholders. See Prudential - Bache Sec. v. Franz Mfg. Co., 531 A.2d 953, 955 (Del. Super. 1987).

¹¹ The Individual Defendants raised this issue in anticipation of AeroGlobal's response to their motion. However, AeroGlobal did not make such a claim.

notions of fair play and substantial justice.¹² Again, AeroGlobal's allegations against the Individual Defendants do not suggest that they took any action in Delaware. The Individual Defendants therefore reason that there is no basis to anticipate being brought into the Delaware courts and no basis for exercising jurisdiction over them consistent with the demands of due process Clause.¹³

AeroGlobal's Response

AeroGlobal's response is twofold.¹⁴

First, AeroGlobal argues that jurisdiction is proper under §3104(c)(3) in that they have alleged tortious injury by virtue the breach of or the tortious interference with the contact between AeroGlobal and Cirrus. Moreover, the language of the statute does not require that the directors

¹² International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

¹³ The Individual Defendants cite to Pestolite, Inc. v. Cordura Corp., 449 A.2d 263, 267 (Del. Super. 1982) and Hirshman v. Vendamerica, Inc. 1992 WL 52141 (Del. Super.).

¹⁴ Again, AeroGlobal did not make the argument that 10 Del. C. §3114 gives this Court jurisdiction over the Individual Defendants. See *infra* footnote 11.

themselves take any action in Delaware, as personal jurisdiction may be conferred through the acts of their agents. AeroGlobal charges that the Individual Defendants engaged in a conspiracy with Crescent and CHCL, and cites to Hercules, Inc. v. Leu Trust and Banking Limited, where the Delaware Supreme Court held that co-conspirators are agents for jurisdictional purposes.¹⁵ As a result, any actions taken by Crescent or CHCL in Delaware would subject the Individual Defendants (as co-conspirators) to the personal jurisdiction of Delaware's courts. AeroGlobal points to the initiation of the Chancery Court litigation and the filing of the amended articles of incorporation as evidence of the formation and implementation of a conspiracy among the corporate entities and the Individual Defendants.

AeroGlobal's second argument is that jurisdiction over the Individual Defendants in Delaware comports with due process. They cite to Istituto Bancario Italiano S.p.A. v.

¹⁵ 611 A.2d 476, 481 (Del. 1992).

Hunter Engineering Co., Inc. to support the proposition that by invoking and accepting the benefits and burdens of Delaware law in the furtherance of a conspiracy, the Individual Defendants have purposely availed themselves of the privilege of conducting activities in this state.¹⁶ AeroGlobal reasons that intentionally proceeding in this fashion subjects the Individual Defendants to personal jurisdiction in Delaware and provides them with a basis to anticipate being subjected to the jurisdiction of the courts of this state.

AeroGlobal insists that each of the elements set forth in Hunter is satisfied in the case at bar and points to the facts alleged in its complaint that show both the existence

¹⁶ 449 A.2d 210, 225 (Del. 1982). Hunter also enumerates five requirements for the exercise of jurisdiction over non-resident co-conspirators. They are as follows:

- 1) a conspiracy to defraud existed;
- 2) the defendant was a member of that conspiracy;
- 3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state;
- 4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and
- 5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.

of a conspiracy to prevent the finalization of the Cirrus/AeroGlobal agreement, and the participation of the Individual Defendants in that conspiracy. In addition, AeroGlobal states that Cirrus and CHCL had to enter Delaware to file Cirrus's amended articles of incorporation. The amendment was an essential step in the aforementioned conspiracy in that it facilitated the sale of the stock to CHCL and that the Individual Defendants (as co-conspirators) knew that an act in furtherance of the conspiracy would necessarily occur in Delaware. Accordingly, AeroGlobal concludes that jurisdiction is proper under §3104 and comports with due process.

Supplemental Arguments

The parties both filed supplemental memoranda in further support of their respective positions. In contrast to its initial response, AeroGlobal contends that it is alleging that misrepresentations made by the Individual Defendants and Cirrus during the Chancery Court Proceeding

give rise to personal jurisdiction under §3104(c), not the filing of the suit itself.¹⁷ Although this argument stands in relatively stark contrast to AeroGlobal's original position, the Court will assume AeroGlobal to mean that the Delaware Chancery Court action, whether in its commencement or during its proceedings, was in furtherance of the alleged conspiracy.

The Individual Defendants argue in their supplemental brief that AeroGlobal has failed to make a sufficient prima facie showing to support a conspiracy theory of jurisdiction. The Individual Defendants also claim that the initiation of the suit in Chancery Court pre-dated the onset of the alleged conspiracy, and the filing of the amended articles of incorporation post-dated that same conspiracy, in the form of the abandoned deal with AeroGlobal. Thus, they maintain, neither of these acts was in furtherance of the conspiracy, and to exercise personal jurisdiction over

¹⁷ Pl.'s Memo. In Further Opp. To the Mot. of Defs.' to Dismiss at 3.

the Individual Defendants based on these acts is violative of due process.

DISCUSSION

When reviewing a motion to dismiss, the Court must view the record in a light most favorable to the nonmoving party.¹⁸ The allegations of the complaint are assumed to be true, and all reasonable inferences must be construed most strongly in favor of the plaintiff.¹⁹

There are two types of in personam jurisdiction that this State may exercise over the non-resident; general or specific.²⁰ General jurisdiction is the finding of jurisdiction over the non-resident defendant based on his

¹⁸ Greenly v. Davis, 486 A.2d 669, 670 (Del. 1984).

¹⁹ Alston v. Hudson, Jones, Jaywork, Williams & Liguori, 748 A.2d 406 (Del. 2000); Ramunno v. Cawley, 705 A.2d 1029 (Del. 1998).

²⁰ Gerber v. Young, Del. Super., C.A. No. 83C-JL-3, Bush, J. (April 6, 1987) (Mem. Op. at 2).

general presence in the State and not specifically based on his or her actions within the state.²¹ Specific jurisdiction, on the other hand, may be found where the plaintiff's claims arise out of the defendant's acts or omissions within the State.²² The latter category of personal jurisdiction is at issue here.

To obtain specific personal jurisdiction over a nonresident party, the Court must apply a two-step analysis. The first step requires the Court to consider whether the Delaware "long arm statute"²³ is applicable to the facts of the case. If the statute is found applicable, the Court must then proceed to an evaluation of whether subjecting the nonresident party to jurisdiction violates the Due Process clause of the Fourteenth Amendment of the United States

²¹ Id.

²² Boone v. Oy Partek AB, 724 A.2d 1150, 1155-1156 (Del. Super. 1997).

²³ See 10 Del. C. §3104(c), *supra*.

Constitution.²⁴ This due process analysis requires the Court to consider whether the nonresident party had sufficient "minimum contacts" with the State so that jurisdiction over the party "does not offend traditional notions of fair play and substantial justice."²⁵ The nonresident party's conduct and connection with the forum state must be such that the party "should reasonably anticipate being haled into court there."²⁶ Stated another way, it must be "fair and reasonable" for the court to exercise jurisdiction over the non-resident party.²⁷

The burden is on the plaintiff to make a specific showing that the Delaware court has jurisdiction under the long-arm statute.²⁸ However, "§3104 has been broadly

²⁴ LaNuova D & B, S.p.A. v. Bowe Co. Inc., 513 A.2d 764, 768 (Del. 1986). It requires only that the exercise of jurisdiction comport with traditional notions of fair play and substantial justice under the Fourteenth Amendment, and that the alleged activities of the defendant fall within the purview of Delaware's long-arm statute. See Klita v. Cyclo3Pss Corp., 1998 Del. Super. LEXIS 382 at *8.

²⁵ International Shoe at 316.

²⁶ World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 294, 297 (1980).

²⁷ Boone at 1158.

²⁸ Greenly at 670.

construed to confer jurisdiction to the maximum extent possible under the due process clause."²⁹ It is in this light that the Individual Defendants' motion must be examined.

First, there is little doubt that the alleged actions by the Individual Defendants fall under the ambit of 3104(c)(3). Construing all reasonable inferences broadly in favor of AeroGlobal, it appears that for present purposes, the Individual Defendants participated in and perpetrated a conspiracy to tortiously interfere with the AeroGlobal/Cirrus relationship. They, or those acting on their behalf, i.e., their agents/co-conspirators, therefore engaged in conduct in the State of Delaware by virtue of the "conspiracy theory" of personal jurisdiction outlined in Hunter.³⁰ However, as literal wording of §3104(c)(3) clearly

²⁹ LaNuova at 768 (citing Speakman Co. v. Harper Buffing Machine Co., 583 F.Supp. 273 (D. Del. 1984); and Moore v. Little Giant Inds., Inc., 513 F.Supp. 1043, 1048 (D. Del. 1981) aff'd, 681 F.2d 807 (3d. Cir. 1982)).

³⁰ See *supra* footnote 16. The Individual Defendants claim that Cirrus's lack of a significant physical presence in Delaware impedes AeroGlobal's recourse to the conspiracy theory of jurisdiction, citing Iotex Comm. v. Defries, 1998 Del. Ch. LEXIS 236 at *24-25. Vice Chancellor Lamb did find in Iotex that where the conspiring acts of the directors of a Delaware

states, those acts or omissions must also have resulted in tortious injury in the State of Delaware. Unless AeroGlobal has met this requirement as well, the Individual Defendants' motions must be granted.

Exactly what is meant by the phrase "tortious injury" is unclear, but appears to be dependent, in the first instance, upon whether the act or omission which allegedly took place in Delaware proximately resulted in some harm to the complaining party. If the act or omission is unrelated, there is no basis upon which to exercise jurisdiction. If such a nexus exists, there must be a determination that the harm occurred in this state.³¹ Here, the first criteria is met by the allegations that the Individual Defendants participated in a conspiracy which involved the filing of a

corporation lacking a significant physical presence in Delaware occurred exclusively outside the State, relief was not available under the conspiracy theory of jurisdiction advanced in Hunter. However, Vice Chancellor Lamb held the facts in Hunter out as an exemplary case in which the theory succeeded. Hunter is similar to the case at bar, as it involved the filing of a certificate of amendment authorizing the issuance of much desired shares in Delaware with the Delaware Secretary of State.

³¹ DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 3-5[a] (Release No. 3 2001).

lawsuit in the Court of Chancery and amended articles of incorporation with the Delaware Secretary of State.

However, the same can not be said concerning the locus of the injury.

In this regard, a thorough review of the pleadings and the transcript of the arguments held before this Court lead to the inescapable conclusion that AeroGlobal has not alleged that tortious injury of any kind took place in Delaware. Nor is there any reasonable basis in the record upon which to conclude that such an injury did in fact take place here.

While neither party devoted a great deal of time or attention to the issue, choosing instead to focus on whether the Individual Defendants were a part of a conspiracy and whether any acts in furtherance thereof were committed in this state, the Individual Defendants did raise this very point in its memorandum in opposition to the motion as well as at oral argument. AeroGlobal has not provided any direct

and/or substantive response on the issue. In fact, there is nothing to indicate where any of the negotiations leading up to agreements in question or the sales of the Cirrus stock were to take place, where the parties did business or where the effect of the tortious interference with the relationship between AeroGlobal and Cirrus otherwise manifested itself.

The only plausible allegation that AeroGlobal could make in this regard would seem to be that the injury that resulted in Delaware was the financial damages suffered by AeroGlobal because it is a Delaware limited liability company. Even if it were alleged, I must conclude that it would not be enough in this case, where none of the parties transact business of any kind or otherwise have any presence in the State of Delaware which might have been harmed by the conduct in question. Stated differently, the losses must have had some impact in this state other than to have been suffered by an entity whose only nexus to Delaware lies in

its legal creation in this state. To do otherwise would be to ignore the statutory mandate set forth in §3104 and fundamental fairness coupled with common sense. The reasoning supporting this conclusion is not complicated.

If the complaining party has no physical presence or financial interests in Delaware and does not transact business here, how can it be injured within the meaning of §3104(c)(3)? Given the nature and character of corporations and partnerships, one could envision a scenario where a motor vehicle owned and operated by Delaware corporation in another state is deemed to be a total loss following a motor vehicle accident, and litigation is instituted in Delaware against the driver who caused the incident. The economic loss could be deemed a tortious injury for purposes of §3104(c)(3), and assuming that there was an act or omission in Delaware, such as some form of a conspiracy, jurisdiction would be complete. While there may be due process concerns as well, there is nothing which suggests that the Delaware

General Assembly intended that jurisdiction over a nonresident individual be exercised in such an expansive and seemingly tenuous manner, at least in this case.³²

Given this Court's view of §3104(c)(3), all we are left with is that there was a conspiracy, parts of which took place in Delaware, and that the Individual Defendants were a part of the conspiracy. There is nothing else and that is not enough. But for this deficiency, it appears that AeroGlobal would have been able to meet the first prong of the test for establishing jurisdiction over the Individual Defendants.

The Court again acknowledges that §3104 is to be given a broad reading so as to effectuate jurisdiction wherever consistent with due process. However, to do so in this case

³² The Court of Chancery, on at least two occasions has left open the question of whether economic harm constitutes "tortious injury". See Abajian v. Kennedy, 1992 Del. Ch. Lexis 6; and Red Sail Easter Limited Partners, LP v. Radio City Music Hall Productions, Inc., 1991 Del. Ch. LEXIS 113. However, in Abajian, then Chancellor Allen stated that "the fictive nature of corporations and the abstract character of some financial injuries makes application of subsection (c)(3)'s language problematic in this setting." 1992 Del. Ch. Lexis 6 at *26. That statement seems to support this Court's view of the situation. See also CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 3-5[a], cited supra.

would require a more direct and affirmative statement of legislative intent. Absent such a statement, the Individual Defendants are entitled to the relief sought. Jurisdiction may not be exercised over them as a result, and it is not necessary to decide whether the exercise of jurisdiction pursuant to §3104 comports with due process.

CONCLUSION

Accordingly, based on the reasons set forth above, the motions filed by Defendants Atalla, Griffith, Midon and Wood to dismiss the Plaintiff's complaint, must be, and hereby are, **granted**.

IT IS SO ORDERED.

TOLIVER, JUDGE