

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE §
PETITION OF SAUL A. FOX, § No. 260, 2010
MERCURY ASSETS, LLC, and §
MERCURY TRUST, on behalf of §
themselves and derivatively on §
behalf of FOX PAINE & §
COMPANY, LLC, FOR WRITS OF §
MANDAMUS AND PROHIBITION §

Submitted: May 25, 2010

Decided: May 28, 2010

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

ORDER

This 28th day of May 2010, it appears to the Court that:

(1) The petitioners, Saul A. Fox, Mercury Assets, LLC, and Mercury Trust, on behalf of themselves and derivatively on behalf of Fox Paine & Company, LLC (collectively, “Fox”), seek to invoke this Court’s original jurisdiction a) to issue an extraordinary writ of mandamus¹ to the Court of Chancery directing it to vacate its April 5 and April 9, 2010 orders in C.A. No. 3187 preliminarily enjoining the prosecution of several actions filed in California; and b) to issue an extraordinary writ of prohibition² prohibiting or staying further proceedings in the Court of Chancery action

¹ Del. Const. art. IV, §11(6); Supr. Ct. R. 43.

² Id.

pending resolution of the actions filed in California.³ W. Dexter Paine, III (“Paine”), the defendant in the Court of Chancery action, has filed an answer requesting that Fox’s petition be dismissed. We find that Fox’s petition manifestly fails to invoke the original jurisdiction of this Court. Accordingly, the petition must be dismissed.

(2) In its petition, Fox argues that the injunction issued by the Court of Chancery was improper for several reasons---first, because it was not supported by Paine’s affidavit, as required by Court of Chancery Rule 65; second, because it was issued *sua sponte* without providing Fox with notice and an opportunity to be heard; and, third, without making findings of fact or conclusions of law regarding the standard for issuing an injunction in accordance with *General Foods v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964). On that basis, Fox claims that the standards for the granting of extraordinary relief by this Court have been met.

(3) In its answer and motion to dismiss, Paine argues that the Court of Chancery acted well within its jurisdiction in issuing a preliminary injunction; the Court of Chancery had an ample record before it when it issued the preliminary injunction; the Court of Chancery has neither

³ Fox also has filed in this Court a petition for interlocutory appeal of the Court of Chancery’s April 5 and April 9, 2010 orders in Supr. Ct. No. 259, 2010.

arbitrarily failed nor refused to perform a duty owed to Fox; and that Fox has failed to demonstrate that it lacks an adequate remedy at law.

(4) This Court may issue a writ of mandamus to compel a trial court to perform a duty.⁴ As a condition precedent to the issuance of the writ, the petitioner must demonstrate that a) he has a clear right to the performance of the duty; b) no other adequate remedy is available; and c) the trial court has arbitrarily failed or refused to perform its duty.⁵ A writ of prohibition, on the other hand, is the legal equivalent of the equitable remedy of injunction and may be issued to prevent a trial court from exceeding the limits of its jurisdiction.⁶ The burden is on the petitioner to demonstrate, by clear and convincing evidence, that the trial court is either without jurisdiction or is attempting to exceed its jurisdiction.⁷ Like a writ of mandamus, a writ of prohibition will not issue if the petitioner has another adequate remedy at law.⁸

(5) After careful review of the parties' submissions, we conclude that there is no basis for the issuance of either a writ of mandamus or a writ of prohibition in this case. Fox has failed to demonstrate that it has a clear right to the relief requested, that the Court of Chancery has arbitrarily failed

⁴ *In re Bordley*, 545 A.2d 619, 620 (Del. 1988).

⁵ *Id.*

⁶ *In re Hovey*, 545 A.2d 626, 628 (Del. 1988).

⁷ *Id.* at 629.

⁸ *Id.* at 628.

or refused to perform its duty, that the Court of Chancery has exceeded or attempted to exceed its jurisdiction, or that no other adequate remedy is available to Fox. As such, Fox's petition for extraordinary relief must be dismissed.

NOW, THEREFORE, IT IS ORDERED that the petition for the issuance of a writ of mandamus and a writ of prohibition is DISMISSED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice