Oakley v. Coast Professional, Inc. et al Doc. 53

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

CARLA OAKLEY,

Plaintiff,

v. CIVIL ACTION NO. 1:21-00021

COAST PROFESSIONAL, INC.,
PERFORMANT FINANCIAL CORP.,
and PERFORMANT RECOVERY, INC.

Defendants.

MEMORANDUM OPINION

On September 30, 2021, the court entered an order (1) granting without prejudice the motion to dismiss of defendant Performant Financial Corp. ("PFC") for lack of personal jurisdiction (ECF No. 9); (2) denying the motion to dismiss of defendants PFC and Performant Recovery, Inc. ("PRI") (ECF No. 11); and (3) denying the motion to dismiss of defendant Coast Professional, Inc. ("Coast") (ECF No. 13). (ECF No. 52.) In this Memorandum Opinion, the court sets forth its reasoning for granting PFC's motion to dismiss for lack of personal jurisdiction.

I. Background

This is a putative class action alleging deceptive debt collection practices by defendants in violation of West Virginia law. Plaintiff says defendants violated the West Virginia

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Consumer Credit and Protection Act ("WVCCPA") when they sent her a letter regarding her defaulted student loan. She says that the letter was deceptive and misleading under the WVCCPA because it represented that the collection agency's contingency fee was due and owing as part of the "current balance" even though the agency had not yet earned the contingency fee by collecting the debt. The contingency fee was listed under the category "Fees and Costs" and was computed assuming that there would be a full recovery of the principal and interest then due on the defaulted loan. There was a false implication, says plaintiff, that the contingency fee (in the amount listed) was "unavoidable" and "fixed." (See, e.g., FAC ¶ 66.)

Plaintiff says that defendants compounded the deception by using language in the body of the letter that attached the U.S. Department of Education's imprimatur to the amount due, and further, by attempting to qualify the "Fees & Costs" with an asterisk and cryptic note (on the back of the letter) suggesting that the amount listed may not be due presently after all, and may change. Plaintiff also points to language on the front page of the letter stating that the amount ultimately due may be greater than the current balance but failing to acknowledge that the amount due may be less (because the contingency fee is ultimately less).

Plaintiff has named three defendants in her First Amended Complaint ("FAC"): Coast, PFC, and PRI. Coast allegedly contracted with the Department of Education to collect the debt and then subcontracted with PRI, which is a wholly owned subsidiary of PFC. PRI sent the collection letter at issue. The letter states that PRI sent it while acting on behalf of Coast. Although PFC is not mentioned in the letter, plaintiff alleges that PFC and PRI sent the letter jointly. Moreover, plaintiff alleges that PFC operates as a single business with a single management team that reports to its CEO.

II. Legal Standard

The United States Court of Appeals for the Fourth Circuit has described the general framework for resolving a threshold personal jurisdiction challenge such as this one as follows:

> When personal jurisdiction is properly challenged under Rule 12(b)(2), the jurisdictional question is to be resolved by the judge, with the burden on the plaintiff ultimately to prove grounds for jurisdiction by a preponderance of the evidence. When, however . . . a district court decides a pretrial personal jurisdiction motion without conducting an evidentiary hearing, the plaintiff need only make a prima facie showing of personal jurisdiction. In deciding whether the plaintiff has made the requisite showing, the court must take all disputed facts and reasonable inferences in favor of the plaintiff.

Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 396 (4th Cir. 2003) (citations omitted).

Federal courts must analyze whether the assertion of personal jurisdiction comports not only with the law of the forum state (the state's long-arm statute), but also with due process. Id. at 396. These two inquiries naturally merge into one when the forum state's law provides for the exercise of personal jurisdiction to the outermost limits of due process. Id. at 396-97.

Whether the two inquiries merge in West Virginia is unclear. A district court is bound to apply the forum state's long-arm statute as interpreted by its high court (although federal interpretations remain persuasive authority). Mylan Labs., Inc. v. Akzo, N.V., 2 F.3d 56, 61, 61 n.5 (4th Cir. 1993). Despite statements in opinions of federal courts that West Virginia's long-arm statute is coextensive with the boundaries of due process, see, e.g., In re Celotex Corp., 124 F.3d 619, 627-28 (4th Cir. 1997), the Supreme Court of Appeals of West Virginia describes its personal jurisdiction analysis as a "two-part inquiry." State ex rel. Third-Party Defendant Health Plans v. Nines, 244 W. Va. 184, 852 S.E.2d 251, 259 (2020) (Armstead, C.J.); see also Syl. pt. 3, State ex rel. Ford Motor Co. v. McGraw, 237 W. Va. 573, 788 S.E.2d 319, 323 (2016) ("A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident.").

The consistent assertion by the state's high court that there are two steps in the personal jurisdiction analysis suggests that West Virginia's long-arm statute, W. Va. Code, § 56-3-33, is possibly not coextensive with the limits of due process after all. Moreover, the parties have pointed the court to no opinion by the state supreme court that collapses the inquiry into a single step. The parties' briefs do not cite West Virginia's long-arm statute. However, because the court determines that the allegations are insufficient under due process, the court need not reach the state law issue at this time.

III. Discussion

The allegations here do not establish a prima facie case for personal jurisdiction over PFC. While plaintiff contends that every allegation against PRI is an allegation against PFC, the reason that plaintiff can reasonably duplicate the allegations is her view that the two entities are really one and the same. Thus, plaintiff's case for personal jurisdiction against PFC rises or falls based on the alter ego theory of personal jurisdiction.[1] While plaintiff's opposition memorandum catalogues facts in support of the alter ego theory, the only allegation in the FAC in support of the alter ego theory is that

[1] This is so for the additional reason that PRI does not contest whether it is subject to this court's jurisdiction.

PFC operates as a single entity. This is too threadbare. But because amendment does not appear futile, the court will grant leave to amend.

Due process requires "'minimum contacts' with the forum, such that to require the defendant to defend its interests in that state 'does not offend traditional notions of fair play and substantial justice.'" Carefirst, 334 F.3d at 397 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). A party may establish personal jurisdiction over a parent corporation that does not otherwise have sufficient minimum contacts when (1) there is personal jurisdiction over the parent's subsidiary; and (2) the subsidiary is the parent's alter ego. See Newport News Holdings Corp. v. Virtual City Vision, Inc., 650 F.3d 423, 433-34 (4th Cir. 2011). This court looks to West Virginia law to determine whether PRI is the alter ego of PFC. See Id. at 434 (applying forum state law in reviewing finding of personal jurisdiction under alter ego theory); see also Est. of Thomson ex rel. Est. of Rakestraw v. Toyota Motor Corp. Worldwide, 545 F.3d 357, 362 (6th Cir. 2008) ("In applying the alter-ego theory of personal jurisdiction in this diversity action, we must look to Ohio law.").

To ask whether there exists an alter ego relationship between a parent corporation and its subsidiary is to ask whether it is appropriate to pierce the corporate veil between

them. See Virtual City, 650 F.3d at 434 (looking to Virginia law of piercing the veil on question of alter ego jurisdiction theory). It is natural that these questions are the same because the doctrine of piercing the corporate veil is one of the "alter ego doctrines." See S. Elec. Supply Co. v. Raleigh Cty. Nat. Bank., 320 S.E.2d 515, 521-22 (W. Va. 1984). Accordingly, the basic inquiry here is whether the allegations are sufficient to show that the corporate veil between PFC and PRI should be pierced under West Virginia law.

"The law presumes that two separately incorporated businesses are separate entities and that corporations are separate from their shareholders." Id. at 516. While the separation between a corporation and its owners is a legal fiction, that fiction is a formidable one, and the party seeking to pierce the corporate veil carries a "heavy burden." See Tucker v. Thomas, 853 F. Supp. 2d 576, 590 (N.D.W. Va. 2012). "The doctrine is complicated, and it is applied gingerly." S. Elec., 320 S.E.2d at 522. As the court explained in Southern States Co-op., Inc. v. Dailey:

> [T]he corporate form will never be disregarded lightly. The mere showing that one corporation is owned by another or that they share common officers is not a sufficient justification for a court to disregard their separate corporate structure. Nor is mutuality of interest, without the countermingling of funds or property interests, or prejudice to creditors, sufficient. Rather it must be shown that

> the corporation is so organized and controlled as to be a mere adjunct or instrumentality of the other.

280 S.E.2d 821, 827 (W. Va. 1981). Later West Virginia opinions have set forth a two-part test for disregarding the corporate form: (1) a unity of interest to such an extent that the corporation and its shareholders have lost their "separate personalities" and (2) an inequitable result but for the disregard of the corporate form. See syl. pt. 6, Kubican v. The Tavern, LLC, 752 S.E.2d 299, 301 (W. Va. 2013) (quoting syl. pt. 3, in part, Laya v. Erin Homes, Inc., 352 S.E.2d 93 (W. Va. 1986)).

The application of this test "requires a fact-driven analysis that is specific to each case." Dailey v. Ayers Land Dev., LLC, 825 S.E.2d 351, 360 (W. Va. 2019). In making this "case-by-case" determination, "some of the relevant factors" are the following:

> (1) commingling of funds and other assets of the corporation with those of the individual shareholders;
>
> (2) diversion of the corporation's funds or assets to noncorporate uses (to the personal uses of the corporation's shareholders);
>
> (3) failure to maintain the corporate formalities necessary for the issuance of or subscription to the corporation's stock, such as formal approval of the stock issue by the board of directors;
>
> (4) an individual shareholder representing to persons outside the corporation that he or she is personally liable for the debts or other obligations of the corporation;

(5) failure to maintain corporate minutes or adequate corporate records;

(6) identical equitable ownership in two entities;

(7) identity of the directors and officers of two entities who are responsible for supervision and management (a partnership or sole proprietorship and a corporation owned and managed by the same parties);

(8) failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking;

(9) absence of separately held corporate assets;

(10) use of a corporation as a mere shell or conduit to operate a single venture or some particular aspect of the business of an individual or another corporation;

(11) sole ownership of all the stock by one individual or members of a single family;

(12) use of the same office or business location by the corporation and its individual shareholder(s);

(13) employment of the same employees or attorney by the corporation and its shareholder(s);

(14) concealment or misrepresentation of the identity of the ownership, management or financial interests in the corporation, and concealment of personal business activities of the shareholders (sole shareholders do not reveal the association with a corporation, which makes loans to them without adequate security);

(15) disregard of legal formalities and failure to maintain proper arm's length relationships among related entities;

(16) use of a corporate entity as a conduit to procure labor, services or merchandise for another person or entity;

(17) diversion of corporate assets from the corporation by or to a stockholder or other person or

> entity to the detriment of creditors, or the manipulation of assets and liabilities between entities to concentrate the assets in one and the liabilities in another;
>
> (18) contracting by the corporation with another person with the intent to avoid the risk of nonperformance by use of the corporate entity; or the use of a corporation as a subterfuge for illegal transactions;
>
> (19) the formation and use of the corporation to assume the existing liabilities of another person or entity.

Dailey v. Ayers Land Dev., LLC, 825 S.E.2d 351, 360 (W. Va. 2019).

The court must pause here and note that, when the issue is jurisdictional veil piercing (as opposed to substantive veil piercing), a different, smaller set of factors may inform the analysis. In Norfolk S. Ry. Co. v. Maynard, the court appeared to adopt a set of eleven factors that had been used in the District of Minnesota:

> (1) Whether the parent corporation owns all or most of the capital stock of the subsidiary;
>
> (2) Whether the parent and subsidiary corporations have common directors and officers;
>
> (3) Whether the parent corporation finances the subsidiary;
>
> (4) Whether the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation;
>
> (5) Whether the subsidiary has grossly inadequate capital;

> (6) Whether the parent corporation pays the salaries and other expenses or losses of the subsidiary;
>
> (7) Whether the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation;
>
> (8) Whether in the papers of the parent corporation or in the statement of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own;
>
> (9) Whether the parent corporation uses the property of the subsidiary as its own;
>
> (10) Whether the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest; and
>
> (11) Whether the formal legal requirements of the subsidiary are not observed.

437 S.E.2d 277, 282 (W. Va. 1993).

Norfolk Southern was decided several years after the debut of the nineteen factors previously mentioned. See Laya, 352 S.E.2d at 99. Thus, the court appears to have made a conscious choice to treat jurisdictional veil piercing differently. Such a choice would be consistent with persuasive federal authority suggesting that when the question is whether to pierce the veil for jurisdictional purposes only, courts should temper the typically quite exacting test to pierce the veil for substantive liability. See Essar Steel Algoma Inc. v. Nevada Holdings, No. 17MISC360ATRWL, 2020 WL 2539031, at *4 (S.D.N.Y. May 18, 2020)

(describing test as "less stringent"); Transfirst Grp., Inc. v. Magliarditi, No. 3:16-CV-1918-L, 2017 WL 528776, at *7 (N.D. Tex. Feb. 9, 2017) (same). The court will assume that the Norfolk Southern factors guide the analysis here. Moreover, the court is mindful that although plaintiff still bears a substantial burden to show that the veil should be pierced for jurisdictional purposes,[2] the full weight of the burden of showing substantive alter ego liability does not rest on plaintiff at this juncture.

Plaintiff's opposition brief begins with this epigraph: "Defendant Performant Financial Corp. manages and operates its company as one business, with a single management team that reports to the Chief Executive Officer." (ECF No. 21, at 1.) Plaintiff goes on to note that "there is information suggesting the two entities are not separate and distinct," and she sets forth this information as she marches through the Norfolk Southern factors. (Id. at 5-9.) But the epigraph features the only fact that plaintiff actually pleaded in support of jurisdictional veil piercing. PFC seizes upon this reality and contends that the allegations of the FAC are, first and

[2] "Ordinarily, courts respect the legal independence of a corporation and its subsidiary when determining if a court's jurisdiction over the offspring begets jurisdiction over the parent." United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1091 (1st Cir. 1992).

foremost, what count here, and that they are insufficient to make a prima facie case for alter ego personal jurisdiction.

The court agrees with PFC. Standing alone, the epigraph's allegation is insufficient. It is also somewhat conclusory. The court cannot assert personal jurisdiction without more. See Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009); Phillips & Stevenson, Fed. Civ. Proc. before Trial (Nat Ed.) Ch. 3-E (2021) ("Courts are increasingly unwilling to accept conclusory allegations of alter ego liability. Therefore, if you are basing personal jurisdiction on an alter ego theory, be sure to plead particular facts demonstrating its application . . . ."). Plaintiff offers more in her opposition brief. That does not resolve the pleading deficiency. It does, however, suggest that plaintiff may be able amend the operative complaint to bridge the gap and make a prima facie case for alter ego personal jurisdiction.[3]

IV. Conclusion

For the reasons stated above, the court granted PFC's motion to dismiss (ECF No. 9) with leave to amend. (ECF No. 52.) Plaintiff has fourteen days to amend, should she choose to

[3] Until plaintiff amends her FAC to incorporate the facts asserted in her opposition brief, the court will not decide whether those facts constitute a prima facie case for jurisdiction.

do so. Finally, the court clarifies that discovery remains stayed as to PFC but is no longer stayed as to Coast and PRI.

The Clerk is directed to send a copy of this Memorandum Opinion to counsel of record.

IT IS SO ORDERED this 14th day of October, 2021.

ENTER:

David A. Faber
Senior United States District Judge