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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3112-13T4

RONALD B. BRUDER and
BROOKHILL CAPITAL RESOURCES,
INC.,

Plaintiffs-Appellants,

v.

DAVID H. HILLMAN, SMC-VIENNA
PARK G.P., INC., VIENNA PARK,
L.L.C., SOUTHERN MANAGEMENT
CORPORATION, and THE GALLOWS
CORPORATION,

Defendants-Respondents.

Argued June 2, 2015 – Decided June 12, 2015

Before Judges Yannotti, Fasciale and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Passaic County, Docket No. C-55-13.

Elisabeth S. Theodore (Arnold & Porter L.L.P.) of the Maryland and District of Columbia bars, admitted pro hac vice, argued the cause for appellants (Sandelands Eyet L.L.P., and Ms. Theodore, attorneys; William C. Sandelands, David B. Bergman, George E. Covucci, and Ms. Theodore, on the briefs).

Gabrielle M. Duvall (Linowes and Blocher L.L.P.) of the Maryland and District of Columbia bars, admitted pro hac vice, argued the cause for respondents (Shapiro, Croland, Reiser, Apfel & Di Iorio, L.L.P., and Ms. Duvall, attorneys; Alexander G. Benisatto and Ms. Duvall, on the brief).

PER CURIAM

Ronald B. Bruder ("Bruder") and Brookhill Capital Resources, Inc., ("Brookhill") (collectively "plaintiffs"), appeal from a February 4, 2014 order dismissing plaintiffs' complaint without prejudice for lack of personal jurisdiction over David Hillman ("Hillman"), SMC-Vienna Park, G.P. ("SMC"), Vienna Park, L.L.C. ("VPLLC"), Southern Management Corporation ("Southern"), and The Gallows Corporation ("Gallows") (collectively "defendants"). We reverse in part, affirm in part, and remand for further proceedings.

I.

Plaintiffs formed a New Jersey limited partnership, Vienna Park, L.P. (the "Partnership") in 1984, and served as the general partners. Bruder was a New Jersey resident at the time of the Partnership's formation, and a New York resident at the time the underlying complaint was filed. Brookhill was a New Jersey corporation at all times. The Partnership's express purpose was to own and operate apartment buildings, specifically a 300-unit complex in Virginia.

The Partnership filed for bankruptcy in 1989 and emerged from bankruptcy in 1993 under an amended partnership agreement (the "Agreement") with Hillman. The Agreement converted plaintiffs' general partnership interests into limited

partnership interests, and substituted Hillman or "any corporation or partnership owned or controlled by [Hillman]" as the general partner. The Agreement retained the Partnership's status as a New Jersey limited partnership.

Pursuant to the Agreement, Hillman substituted SMC, a company Hillman owned, as the general partner and designated Southern, another Hillman-owned entity, as the Partnership's manager. Between 1993 and 2007, Southern mailed monthly statements of accounts to the limited partners located in New Jersey and filed annual partnership reports with the New Jersey Department of Treasury, in exchange for payment from the Partnership.

In 2007, Hillman, through Southern and SMC, directed that the Partnership be converted into VPLLC as part of an overall strategy to refinance loans. Hillman executed a new operating agreement (the "OA") for VPLLC, transferring management to another of Hillman's entities, Gallows. The OA stated that the general and limited partners of the Partnership "agreed to enter into this [OA] to regulate the affairs of [VPLLC], the conduct of its business, and the relations of its [m]embers."

Plaintiffs alleged that they did not learn of the conversion until 2012 and promptly requested to review certain records and books, which Hillman denied. Plaintiffs then filed the underlying complaint to unwind the conversion and review the

books and records of VPLLC. Plaintiffs maintained that the conversion was not only illegal because they were uninformed, but that the OA significantly altered their rights including exculpating VPLLC's manager from liability, creating new membership classes, and increasing fees paid to the management company.

Defendants filed a motion to dismiss the underlying complaint for lack of personal jurisdiction, lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or in the alternative, summary judgment. Defendants primarily asserted that New Jersey did not have jurisdiction to adjudicate the underlying complaint because defendants did not have the requisite contacts with New Jersey. In their memorandum of law supporting the motion to dismiss, defendants made specific arguments in this regard on behalf of Hillman, Southern, and Gallows, and "expressly reserve[d] their rights pursuant to [Rule] 4:6-2 to assert lack of personal jurisdiction as a defense" as it related to SMC and VPLLC.

Defendants also claimed that the underlying complaint should be dismissed because plaintiffs had a limited interest in VPLLC, were aware of the Partnership's conversion to VPLLC, and accepted $568,500 in distributions from VPLLC. Defendants provided a December 7, 2006 letter issued by Hillman, on behalf of Southern, to all partners of entities owned by Hillman,

indicating that because of a "new financing package" all partnerships other than "single tier [l]imited partnerships" would be converted into limited liability companies. Defendants provided copies of the Schedule K-1 forms issued to plaintiffs between 2007 and 2012 which listed VPLLC as the issuing entity.

The judge conducted oral argument and concluded in a written opinion that there was "no basis to establish that [a New Jersey court] has jurisdiction to entertain disputes between these parties." The judge subsequently dismissed the underlying complaint without prejudice, indicating that it was "clear that this case should more properly be adjudicated in the State of Virginia[,]" and entered the February 2014 order.

On appeal, plaintiffs argue that (1) VPLLC and SMC waived their personal jurisdiction defenses and (2) even if personal jurisdiction defenses were not waived as to VPLLC and SMC, New Jersey has personal jurisdiction over all defendants.

II.

We begin by addressing plaintiffs' contention that VPLLC and SMC waived their personal jurisdiction defenses.

We review the trial court's ruling on a motion to dismiss for lack of jurisdiction at the inception of the case de novo. Baanyan Software Servs., Inc. v. Kuncha, 433 N.J. Super. 466, 476 (App. Div. 2013). Personal jurisdiction is an "individual right" and "'it can, like other such rights, be waived'" or be

"'subject to certain procedural rules'" which may result in "'curtailment of the rights.'" Rosa v. Araujo, 260 N.J. Super. 458, 464 (App. Div. 1992) (quoting Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 703-05, 102 S. Ct. 2099, 2105, 72 L. Ed. 2d 492, 502 (1982)), certif. denied, 133 N.J. 434 (1993).

Notwithstanding our view that personal jurisdiction is a right that may be waived, we have recognized that personal jurisdiction is a

> constitutionally based defense and one that goes to the very jurisdiction of the court. In this context, the waiver cannot be equivocal and a finding of waiver must be made with recognition of both the constitutional principles involved and the waiver's relationship to the Full Faith and Credit Clause regarding later enforceability of the judgment. There must be strict scrutiny given to a waiver argument in this context[.]
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> [Byrnes v. Landrau, 326 N.J. Super. 187, 193 (App. Div. 1999) (citations omitted), certif. denied, 163 N.J. 78 (2000).]

Moreover, our court rules require that "'[a]ll pleadings shall be liberally construed in the interest of justice." Ibid. (quoting R. 4:5-7).

On this record, we conclude that VPLLC and SMC did not unequivocally waive their personal jurisdiction defenses. To the contrary, defendants, including VPLLC and SMC, specifically moved for dismissal of plaintiffs' complaint "with prejudice for

lack of personal jurisdiction[.]" This placed plaintiffs on notice of defendants' intention to move for dismissal as it related to all defendants. See Byrnes, supra, 326 N.J. Super. at 191 (noting that when a defendant timely states the court lacks personal jurisdiction, this "clearly put[s] [the] plaintiff on notice").

Although defendants' memorandum of law in support of the motion only raised personal jurisdiction arguments as to Southern, Hillman, and Gallows, defendants' counsel specifically reserved SMC and VPLLC's right to raise arguments in support of their motion to dismiss for lack of personal jurisdiction. Defendant's counsel also made clear at oral argument that New Jersey does not have jurisdiction over any of the defendants.

III.

We next consider plaintiffs' argument that the judge erred in granting the motion to dismiss for lack of jurisdiction.

A.

New Jersey courts may exercise personal jurisdiction over a non-resident defendant "to the uttermost limits permitted by the United States Constitution." Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971). Personal jurisdiction may be general or specific depending upon the "quality and quantum of [the] contacts" with the forum state. Citibank, N.A. v. Estate of Simpson, 290 N.J. Super. 519, 526 (App. Div. 1996). When

personal jurisdiction is general, "the defendant is subject to any claim that may be brought against him [or her] in the forum state whether or not related to or arising out of the contacts themselves[.]" Id. at 526-27. The defendant must have "continuous and systematic activities in the forum[.]" Waste Mgmt., Inc. v. Admiral Ins. Co., 138 N.J. 106, 119 (1994), cert. denied sub nom., WMX Techs., Inc. v. Canadian Gen. Ins. Co., 513 U.S. 1183, 115 S. Ct. 1175, 130 L. Ed. 2d 1128 (1995).

Personal jurisdiction is specific when "the claim is related to or arises out of the contacts in the forum[.]" Citibank, supra, 290 N.J. Super. at 527. In other words, the question is "whether the defendant has 'purposely avail[ed] itself of the privilege of conducting activities within the forum state.'" Ibid. (alteration in original) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-475, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528, 542 (1985)).

We apply the two-part test outlined in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), to determine "the extent to which courts can assert personal jurisdiction over out-of-state residents." Baanyan Software, supra, 433 N.J. Super. at 473. This requires the out-of-state defendant to have "'certain minimum contacts'" with the forum state, and those "minimum contacts must be of a nature and extent 'such that the maintenance of the suit does not offend

traditional notions of fair play and substantial justice.'" Id. at 473-74 (quoting Int'l Shoe, supra, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102). We consider personal jurisdiction "on a case-by-case basis." Id. at 476 (citation and internal quotation marks omitted).

The United State Supreme Court has "clarified the purposes of the 'minimum contacts' doctrine: to protect a defendant against litigating in an inconvenient forum and to ensure that States not exceed their jurisdictional limits under our federal system." Waste Mgmt., supra, 138 N.J. at 120 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490, 498 (1980)). Critical to the analysis is "whether the defendant should reasonably anticipate being haled into court in the forum state." Ibid. (citing Burger King, 471 U.S. at 474, 105 S. Ct. at 2183, 85 L. Ed. 2d at 542). Other factors include "'the interests of the forum [s]tate, and the plaintiff's interest in obtaining relief[;] . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interests of the several [s]tates in furthering fundamental substantive social policies.'" Baanyan Software, supra, 433 N.J. Super. at 476 (first and third alterations in original) (quoting Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 113, 107 S. Ct. 1026, 1033, 94 L. Ed. 2d 92, 105 (1987)).

B.

Applying these well-settled principles, we conclude that New Jersey has specific personal jurisdiction over VPLLC, Hillman, SMC, and Southern.[1] These parties had sufficient minimum contacts with New Jersey as to satisfy notions of fair play and substantial justice.

VPLLC is a successor-in-interest to the Partnership, which was organized under the laws of New Jersey. It has been recognized that the "jurisdictional contacts of a predecessor corporation may be imputed to its successor corporation without offending due process."[2] Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 783 (7th Cir. 2003); see also Patin v. Thoroughbred Power Boats Inc., 294 F.3d 640, 654 (5th Cir. 2002) (indicating that "[a] successor corporation that is deemed to be a 'mere continuation' of its predecessor corporation can be bound by the predecessor corporation's voluntary submission to the personal jurisdiction of a court"); Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128, 1132 (10th Cir. 1991) (stating that "[a] corporation's contacts with

[1] We note that plaintiffs did not argue that New Jersey had general personal jurisdiction over defendants.

[2] Although we are not bound by lower federal court decisions, such decisions are given due respect in an attempt to create "judicial comity" and to avoid forum shopping. Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 79-80 (1990).

a forum may be imputed to its successor if forum law would hold the successor liable for the actions of its predecessor"). As such, because VPLLC is a continuation of the Partnership, and the Partnership voluntarily submitted itself to jurisdiction in New Jersey by organizing as a limited partnership under our laws, New Jersey has personal jurisdiction over VPLLC.

The alleged unlawful actions of defendants Hillman, SMC, and Southern, namely converting a New Jersey limited partnership into VPLLC purportedly without proper notice, also grants New Jersey personal jurisdiction over these defendants. Our Supreme Court has previously held that when "a non-resident defendant purposely directs its activities to the forum, and the litigation results from alleged injuries that arise out of or relate to those activities, the forum may assert personal jurisdiction over the defendant." Lebel v. Everglades Marina, Inc., 115 N.J. 317, 326 (1989) (citation and internal quotation marks omitted).

Here, Hillman, SMC, and Southern were actively involved in the management of the Partnership, as indicated by the Agreement. Hillman admitted, in his certification attached to the motion to dismiss, that the Agreement was "negotiated (on behalf of myself or any corporation or partnership owned or controlled by me) for complete control and all voting rights of the Partnership as consideration for my capital investment in

the Partnership." The Agreement further stated that SMC would be substituted as the general partner of the Partnership, and Southern would act as the Partnership's manager.

The alleged illegal act, dissolution of the Partnership, occurred while the Partnership was still in effect under New Jersey law. This is supported by the December 6, 2007 letter, apparently issued by Hillman on behalf of Southern, to inform plaintiffs and others of the pending reorganizations. Moreover, the alleged harmful act actually occurred in New Jersey, as indicated by the October 16, 2009 statement from the New Jersey Department of Treasury revoking the Partnership for "Failure to Pay Annual Reports."

Such facts go directly to the heart of New Jersey's interest in adjudicating the matter and it could therefore be expected that this action taken to dissolve the Partnership and form VPLLC would be subject to suit in New Jersey. The underlying complaint not only involves our laws of incorporation and dissolution, but the Partnership had, and VPLLC currently has, members who are New Jersey residents, including plaintiff Brookhill, and whose stake in the Partnership were converted to membership shares in VPLLC.

In addition, we note that SMC served as the general partner of the Partnership and Southern acted as its manager pursuant to the Agreement. Hillman was the sole owner of both of these

entities. For fourteen years, from 1993 to 2007, SMC, Southern, and Hillman gained a benefit from the Partnership and purposefully availed themselves of the benefits of New Jersey law, including maintaining the Partnership under New Jersey law. Southern actively mailed correspondence, accounting statements, and tax documents into New Jersey over that period in exchange for management fees. Hillman and SMC also profited from the Partnership while it was organized under New Jersey law.

Defendants maintain that personal jurisdiction does not exist because the conversion of the Partnership to VPLLC occurred in Virginia, and because any ties to New Jersey were severed when the Partnership dissolved. This argument is not persuasive. It fails to recognize the fourteen years of contacts between Hillman, SMC, Southern and New Jersey. Furthermore, the purported illegal act is the dissolution of the Partnership. Defendants cannot assert that the complained of action destroyed personal jurisdiction, when but for that act there would be no claim.

C.

We conclude that Gallows does not have the requisite contacts for New Jersey to exercise personal jurisdiction. Gallows is a Delaware-based corporation whose purpose is to act as manager of VPLLC. It has no ties to the Partnership and took no specific acts in New Jersey. Based upon the OA, Gallows was

allowed to enter into a management agreement with Southern to continue its role as manager, thus insulating itself from contact with New Jersey. Unlike the other defendants, Gallows played no part in the supposed unlawful conversion. See Baanyan Software, supra, 433 N.J. Super. at 473 (merely entering into an agreement with a New Jersey corporation and providing services out-of-state on behalf of that company is not enough to create personal jurisdiction).

Moreover, plaintiffs fail to illustrate any benefit that Gallows derived from New Jersey. This stands in contrast to the other defendants in this case. It also makes Gallows' contacts with New Jersey even less than those of the defendant in Baanyan, who received payments from that New Jersey corporation for services rendered outside of the state. Ibid.

IV.

Defendants assert in their brief that we can affirm the February 2014 order on the other grounds raised in their motion to dismiss. We decline to do so.

It is well-established that we "may exercise such original jurisdiction as is necessary to complete the determination of any matter on review." R. 2:10-5. The purpose of Rule 2:10-5 is to allow us to "eliminate unnecessary further litigation[.]" State v. Micelli, 215 N.J. 284, 293 (2013) (citation and internal quotation marks omitted). However, the Court in

Micelli reinforced that original jurisdiction should be exercised with "great frugality" and not when there is a need to "weigh[] evidence anew" or "mak[e] independent factual findings[.]" Ibid. (alterations in original) (citations and internal quotation marks omitted).

Here, the judge made no findings as to the alternative grounds for affirmance raised by defendants. We have remanded similarly situated matters to the trial court with instructions to consider the alternative arguments that were raised, but not considered. See People for Open Gov't v. Roberts, 397 N.J. Super. 502, 515 (App. Div. 2008) (noting that when the Law Division judge did not address other arguments, the other "issues are to be considered by the judge on remand"). Because the issues asserted by defendants have not been fully considered by the trial court, we remand to the judge to consider the additional arguments defendants raised in their motion to dismiss.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.