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FDASMART, Inc. v. Dishman Pharmaceuticals and Chemicals Limited, et al.,
448 N.J. Super. 195 (App. Div. 2016) (Decided December 29, 2016)

Holdings: New Jersey did not have specific or general personal jurisdiction over defendant, Dishman Pharmaceuticals and Chemicals, LTD (“DPCL”), a foreign corporation. It was not shown that DPCL had sufficiently dominated its local, wholly-owned subsidiary, Dishman USA, Inc., to justify the piercing of DPCL’s corporate veil in order to impute the subsidiary’s contacts with New Jersey to DPCL for purposes of personal jurisdiction.

Even proper service upon a representative of a foreign corporation in New Jersey does not confer long-arm jurisdiction upon the foreign corporation in the absence of sufficient minimum contacts with the State.

Facts and Legal Analysis:

The appeal arose out of the Trial Court’s grant of partial summary judgment to the Plaintiff on several issues under Rule 4:6-2. In 2013, Plaintiff, FDASmart, Inc. (“FDASmart”), a Delaware corporation with a principal place of business in New York, was contacted by PKM, an Indian consulting firm engaged in the business of advising its clients on mergers and acquisitions. PKM invited FDASmart to consult with it on behalf of DPCL, an Indian Corporation headquartered in India, in furtherance of DPCL’s efforts to sell a certain manufacturing facility owned by its Chinese subsidiary.

The three companies met in India and entered into a Memorandum of Understanding relative to the consulting services, the final draft of which identified “Dishman Group” a tradename referring collectively to DPCL and its subsidiaries as the signatory. The final draft of the MOU was signed by the managing director of DPCL, which was to be governed and construed under the law of India. Invoices were subsequently sent to DPCL in India and payment on the invoices was made by DPCL directly. When a dispute arose regarding sales efforts, DPCL decided not to sell the facility in China, whereupon FDASmart brought suit in New Jersey against DPCL and Dishman USA, its wholly-owned, New Jersey subsidiary, for breach of contract, among other claims.

In lieu of an answer, the defendants moved for dismissal of the action on grounds of lack of personal jurisdiction as to DPCL, failure to state a claim against Dishman USA, and failure to join PMK as an indispensable party. The Trial Court denied the motion without prejudice and permitted limited jurisdictional discovery, after which FDASmart moved for partial summary judgment on the issue of jurisdiction, prompting a renewed motion to dismiss by the Defendants. The Trial Court granted partial summary judgment and found that New Jersey had general jurisdiction over DPCL, that New Jersey was an appropriate forum, that FDASmart had stated a claim against Dishman USA, and that PKM was not an indispensable party. The defendants appealed.

The most prominent issue on appeal was whether FDASmart could establish general personal jurisdiction over DPCL in New Jersey on the basis of the contacts of its local, wholly owned subsidiary, Dishman USA. The Court therefore looked to the two-part test developed by the U.S. Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945).

The Court first considered whether there were sufficient “minimum contacts” between the DPCL, the forum, and the litigation, noting that personal jurisdiction under International Shoe requires “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws.”

The Trial Court had held that the business relationship between FDASmart and DPCL was insufficient to establish specific jurisdiction, and the Appellate Division agreed. However, on the issue of general jurisdiction, the Appellate Division disagreed with the Trial Court and reversed its decision.

The Appellate Division first reiterated the principles articulated in Lebel v. Everglades Marina, Inc., 115 N.J. 317, 322 (1989), which established that general jurisdiction requires continuous and systematic activities in the forum state. It further noted that typically, a corporation’s principal place of business establishes the place at which it is “essentially at home” for this purpose. The Court noted that DPCL was not “at home” in New Jersey, as it was not formed here and did not have its principal place of business here.

Next, the Court considered FDASmart’s argument, accepted by the Trial Court, that the activities of Dishman USA, the subsidiary, should be imputed to DPCL for purposes of personal jurisdiction, on a alter ego theory. In this regard, the Court relied on Pfunstein v. Omnicom Grp., Inc. 285 N.J. Super. 245, 252 (App. Div. 1995) for the proposition that “something more than mere ownership” is required before the forum contacts of a subsidiary will be imputed to a parent corporation for jurisdictional purposes. It then drew piercing principles from State Vept. Of Env’tl. Prot. v. Ventron Corp., 94 N.J. 473, 500-01 (1983), with particular emphasis on the issue of whether “the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent.”

Analyzing the Pfundstein factors, including “common ownership, financial dependency, interference with a subsidiary’s selection of personnel, disregard of corporate formalities, and control over a subsidiary’s marketing and operational policies,” the Appellate Division found

insufficient evidence to pierce the corporate veil and impute Dishman USA's New Jersey contacts to DPCL. In doing so, the court specifically noted that dominance "cannot be established by overlapping boards of directors," quoting Verniex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 201 (App. Div. 2006).

The Appellate Division rejected FDASmart's argument that Dishman USA was "totally dependent" on its parent, predicated on the testimony of its representative that it "barely meets its expenses." The Court found that the ability to meet its expenses, albeit "barely" eliminates an inference of financial dependence on the parent. It found no evidence of any interference by DPCL in selection of Dishman USA's personnel, operational, or marketing policies, and there was no dispute as to the distinctness of the entities, as they engaged in arms-length transactions in accordance with applicable tax laws.

Because FDASmart could not establish the first element of a piercing theory, its argument as to general jurisdiction on the basis of the subsidiary's contact with New Jersey failed, and the Trial Court's decision denying dismissal was reversed.

The Appellate Division then analyzed FDASmart's alternate argument, that in personam jurisdiction existed as a result of its personal service of process upon an employee of DPCL when he came to New Jersey for the purpose of attending his deposition for this litigation. FDASmart had apparently served the representative in accordance with Rule 4:4-4(a)(6) when he appeared for his deposition. However, the Appellate Division ruled that the Trial Court had conflated the issues of proper service, with the distinct issue of long-arm jurisdiction over a foreign defendant. In this regard, it cited *Pressler & Verniero* for the principle that "the various modes of service ... 'cannot be read as mechanisms for obtaining long-arm jurisdiction unless the underlying predicate of long-arm jurisdiction, adequate contact with the State, exists.'"

Because it found no basis for jurisdiction against DPCL, it did not reach the issues of forum non conveniens or whether PKM was an indispensable party, as DPCL was no longer a party to the suit. (Footnote 3)

Finally, the Appellate Division rejected Dishman USA's contention that FDASmart's complaint against it should have been dismissed for failure to state a claim. It agreed with the Trial Court that, accepting all inferences in FDASmart's favor, the signature of DPCL's managing director on the MOU purportedly on behalf of all of the entities, through their collective trade name, suggested an intent to bind all of DPCL's subsidiaries. The Court thus reversed the grant of summary judgment to FDASmart on the issue of jurisdiction over DPCL, affirmed the Trial Court's denial of Dishman USA's motion to dismiss, and remanded the matter for further proceedings.

Questions Raised:

To what degree did the choice of laws provision in the MOU, the existence of a separate suit between PMK and DPCL in India (Footnote 2), and the availability of an alternate forum (India) impact the Appellate Division's decision on general personal jurisdiction?

Could FDASmart have avoided any of the jurisdictional defenses raised by bringing its suit in Federal Court on the basis of diversity of citizenship?

To what extent could the signature of DPCL's managing director on an MOU on behalf of the entities' collective trade name have been considered a discrete failure to observe appropriate corporate formalities? Otherwise, to what extent did the Courts really credit the inference that it was intended to bind all of the entities?

Points to Consider:

Mere ownership of a local subsidiary, even full ownership with an overlapping board of directors, is insufficient to establish an alter ego theory for purposes of personal jurisdiction over a foreign corporation. Thus, given the opportunity for jurisdictional discovery, it will be essential to obtain any and all communications, memoranda, etc. between the board of directors and the officers of the subsidiary that bear upon (a) overarching control of personnel, operations, and/or marketing on the part of the parent (b) financial dependence on the part of the subsidiary and/or overreaching by the parent as to its revenue, etc., or (c) failure to maintain full corporate formalities relative to each, separate corporation, including failure to properly report and account for income.

Even good service upon a corporate designee appearing in this State will not confer jurisdiction over a foreign corporation in the absence of the requisite minimum contacts sufficient for personal jurisdiction.