EFiled: Dec 22 2020 03:27PM EST
Filing ID 66206083
Case Number Multi-Case

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GXP CAPITAL, LLC, a Nevada limited liability company, Plaintiff, v. ARGONAUT MANUFACTURING SERVICES, INC., a Delaware corporation, TELEGRAPH HILL PARTNERS III, L.P., a Delaware limited partnership, and TELEGRAPH HILL PARTNERS III INVESTMENT MANAGEMENT, LLC, a Delaware limited liability company, Defendants.	)	Nos. 247,2020 and 248,2020 On appeal from the Superior Court of the State of Delaware in C.A. No. N18C-07-267-PRW

REPLY BRIEF ON APPEAL OF APPELLANT GXP CAPITAL, LLC

David L. Finger (DE Bar ID #2556)
Finger & Slanina, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525
dfinger@delawgroup.com
Attorney for
Plaintiff-below/Appellant
GXP Capital, LLC

Dated: December 22, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

I. THE SUPERIOR COURT'S ORDER STAYING THE DELAWARE ACTION TO ALLOW GXP TO FILE A NEW ACTION IN CALIFORNIA IS APPEALABLE AS A FINAL ORDER AS IT EFFECTIVELY ENDS LITIGATION IN DELAWARE WITHOUT ADDRESSING THE MERITS, CREATING A SITUATION WHICH DENIES AN APPEAL AS OF RIGHT.

In this Court's Order dated October 7, 2020, this Court stated that "additional briefing on the finality issue raised in the responses to the notice to show cause issued in Appeal No. 247, 2020 is necessary," and instructed that "the parties' briefs should address [] whether the Stay Order is appealable as a final judgment...."

Appellees now argue that the issue has become a moot "academic question" because this Court did not narrow the scope of the appeal to the issues specifically identified in the trial court's Order of August 3, 2020, granting certification of an interlocutory appeal. (Appellee's Answering Brief ("Ans. Brf.") at 38).[1] Nonetheless,

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[1] Courts in other jurisdictions have held that an interlocutory order brings up all issues on appeal, not just the ones designated by the lower court. *See, e.g., Paper, Allied-Industrial v. Continental Carbon*, 428 F.3d 1285, 1291 (10th Cir. 2005) (interlocutory appeals originate from district court's order itself; appellate court can and should address different legal question if it controls disposition of certified order); *McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1255 (11th Cir. 2004) (under statute governing interlocutory review, scope of appellate review is not limited to precise question certified by district court because court's order, not certified question, is brought before appellate court); *Kronemeyer v. U.S. Bank National Ass'n*, 857 N.E.2d 686 (Ill. App. 2006) (where appealable issues are intertwined with (continued...)

Appellees present several arguments why the Order of the Superior Court should not be considered an appealable final order. GXP responds as follows.

A. GXP DID NOT WAIVE ITS RIGHT TO SEEK AN APPEAL AS OF RIGHT.

Appellees argues that GXP waived its argument that the Order is final and appealable because GXP referred to it as an interlocutory order and sought certification of an interlocutory appeal (which was filed in this Court simultaneously with its notification of appeal as of right). Not surprisingly, Appellees have not offered any authority from any source supporting this theory.

Assuming for the sake of argument that a party can waive appeal rights by statements made in the trial court, the statements identified by Appellees do not satisfy the test for waiver. A waiver may be express or implied, but either way it must be unequivocal. *Amirsaleh v. Board of Trade of City of New York, Inc*., 27 A.3d 522, 529-30 (Del. 2011). An express waiver exists where it is clear from the language used that the party is intentionally renouncing a right of which it is aware. An implied waiver is only possible if there is a clear, unequivocal, and decisive act of the party

[1](...continued)
nonappealable issues, appellate court may go beyond certified question and consider appropriateness of order giving rise to interlocutory appeal); *Armijo v. Wal-Mart Stores, Inc.*, 168 P.3d 129 (N.M. App. 2007) (on interlocutory appeal, appellate court's scope of review extends beyond the question posed).

demonstrating relinquishment of the right. *Id*.; *Bouchard v. Braidy Industries, Inc.*, 2020 WL 2036601 at *8 (Del. Ch. Apr. 28, 2020).

Appellees point to two things: (I) GXP's noting in its motion for reargument that the ruling was interlocutory, and (ii) GXP's moving for certification of an interlocutory appeal before filing its notice of appeal as of right. (Ans. Brf. 39-40).

As to the former, the Order is interlocutory. However, as detailed in GXP's opening brief and below, interlocutory orders can be and sometimes are treated as final orders for the purpose of an appeal. As such, there is nothing in that statement indicating an intent to waive GXP's right to seek an appeal as of right.

As to the latter, Appellees suggest that by not informing the trial court that it would also seek an appeal as or right, it misled the trial court. (AAB 40). Nothing in the record supports Appellees' speculation.

B. THE "OUT OF COURT" DOCTRINE APPLIES.

Appellees argue that the "Out of Court" doctrine is inapplicable because it is based upon principles of federalism. (AAB 41). Appellees utterly ignore the state court cases cited by GXP applying the same principle, which do not involve issues of federalism.

As one example where a state court applied the rule, in *Monarch Academy Baltimore Campus, Inc. v. Baltimore City Board of School Commissioners*, 175 A.3d

757 (Md. App. 2017), the lower court stayed the judicial proceedings pending resolution of administrative proceedings. The plaintiff appealed. The Maryland high court stated:

> "[e]ven if the order does not decide and conclude the rights of the parties, it nevertheless will be a final judgment if it terminates the proceedings in that court and denies a party the ability to further prosecute or defend the party's rights concerning the subject matter of the proceeding." Such an order has been described as one that '**has the effect of 'put[ting] the [party] out of court**.'"
>
> We have held that the "key question" as to whether an order that terminates proceedings in a particular court has the effect of putting a party out of court is "whether the order contemplates that the parties will no longer litigate their rights in that court."
>
> * * *
>
> We have consistently recognized that any order that contemplates parties will no longer litigate their rights in that court is a final judgment.

Id. at 783-84 (citations omitted, bold in original).

In the present action, the stay was not issued for the purpose of allowing another court to resolve issues that may be relevant in the present action. It was for the purpose of ending litigation in the Superior Court. As such, the Order effectively puts GXP out of court such that the Order should be deemed final for purposes of appeal.

C. THE "COLLATERAL ORDER" DOCTRINE APPLIES.

Appellees argue that the Collateral Order doctrine is inapplicable because it only applies to appeals by non-parties. Appellees rely in support on language in *Evans v. Justice of the Peace Court No. 19*, 652 A.2d 574, 577 (Del. 1995). The language in *Evans* was describing the ruling in *Gannett Co., Inc. v. State*, 565 A.2d 895, 900 (Del. 1989). *Gannett* arose from an appeal by a non-party newspaper of an Order that it claimed restricted its rights under the First Amendment. However, nothing in *Gannett* limited the application of the Collateral Order doctrine to appeals by non-parties. Indeed, in *Gannett* this Court cited with approval a decision by the U.S. Supreme Court in *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541 (1949). *Gannett Co., Inc*., 565 A.2d at 899-900. *Cohen* applied the doctrine to an appeal by a party. 337 U.S. at 545-46. *See also Osborn v. Haley*, 549 U.S. 225, 230-31, 238-39 (2007) (applying the Collateral Order doctrine to an appeal from the plaintiff).

In light of this history, Appellees' argument lacks merit.

D. THE STAY IMPOSED BY THE SUPERIOR COURT DENIES GXP AN APPEAL AS OF RIGHT.

In its opening brief, GXP demonstrated that the Order denies GXP an appeal *as of right* because, if litigation were commenced in California and proceeded to a judgment, the case would be resolved and this Court would not have before it a live

controversy regarding the correctness of the Superior Court's ruling denying GXP a Delaware forum. For this reason, in addition to and independent of the reasons addressed above, the Order should be deemed final for purposes of appeal.

Appellees seem to have missed this point, as their response is that there is no right to an immediate appeal of an interlocutory order. An interlocutory order, being discretionary, absent an exception, is not the equivalent of a final order for which under Delaware law there is an appeal as of right. This case is one where exceptions apply.

GXP also noted that it is no answer to say that GXP can wait 90 days, see the Delaware action dismissed, and then file an appeal. A dismissal based on abandonment is generally with prejudice. Appellees respond that the answer is to file an interlocutory appeal. However, a discretionary appeal, with no assurance that it will be accepted, is no answer at all.

II. THE NON-EXCLUSIVE VENUE PROVISION PRECLUDES THE APPLICATION OF *FORUM NON CONVENIENS*.

A. THE SUPERIOR COURT HEARD AND ADDRESSED THE ISSUE WITHOUT OBJECTION BY APPELLANTS.

Appellees argue that the issue was not fairly presented to the Superior Court and so the standard of review by this Court on the issue should be "plain error."

GXP presented the issue in a letter to the Superior Court in advance of a hearing on the merits of the Appellees' motion to dismiss on the ground of *forum non conveniens*. Appellees had an opportunity to submit a response but chose not to do so. Appellees did not object to the discussion of the issue at the hearing. (A-304-323). Appellees did not request an opportunity to submit a written response. The Superior Court addressed the issue in original Opinion and Order dated May 4, 2020. GXP raised the issue again in its Motion for Reargument (A-324-330), and Appellees disputed it in their Opposition to Motion for Reargument. (A-331-338). The Superior Court withdrew its original Opinion and Order and issued the Order on July 1, 2020, in which it adhered to its rejection of GXP's argument. This satisfies the requirement that the issue be fairly presented below.

B. THE UNUSUAL LANGUAGE OF THE FORUM SELECTION PROVISION DEMONSTRATES THE PARTIES' INTENTION TO RESTRICT APPLICATION OF *FORUM NON CONVENIENS*.

Appellees argue that while the forum provision establishes that litigation in California is not inconvenient, it does not establish that Delaware is a convenient forum. Appellees, by forming their entities in Delaware, should be deemed to have waived any claim that Delaware is an inconvenient forum. In any event, Appellees put the cart before the horse. The question is whether the provision bars the application of *forum non conveniens*. Under *Ingres Corp. v. CA, Inc*., 8 A.3d 1143 (Del. 2010) and *Utilipath, LLC v. Hayes*, 2015 WL 1744163 (Del. Ch. Apr. 15, 2015), the answer is "yes."[2] Tellingly, Appellees do not even mention, let alone discuss,

[2] Appellees suggest that California law applies to interpreting the forum selection clause. (Ans. Brf. 33 n.4). While interpretation of a forum selection clause (*e.g.,* whether it is permissive or mandatory, whether it covers the claims in question) is governed by the law specified in a choice of law provision, the enforceability of a such a provision is deemed procedural, not substantive, and so the law of the forum applies. *Davis v. Oasis Legal Finance Operating Company, LLC*, 936 F.3d 1174,1178 (11th Cir. 2019); *In re McGraw-Hill Global Education Holdings LLC*, 909 F.3d 48, 58 (3d Cir. 2018); *Magi XXI, Inc. v. Stato della Citta del Vaticano*, 714 F.3d 714, 720-21 (2d Cir. 2013). *See also Barshaw v. Allegheny Performance Plastics, LLC,* --- N.W.2d ---, 2020 WL 6930058 at *4-5 (Mich. App. Nov. 4, 2020); *RMBS Recovery Holdings, I, LLC v. HSBC Bank USA, N.A.,* 827 S.E.2d 762, 767-69 (Va. 2019) . Indeed, in *Ingres* the contract stated that it was governed by California law, *CA, Inc. v. Ingres Corp.*, 2009 WL 4575009 at *29 (Del. Ch. Dec. 7, 2009), *aff'd*, 8 A.3d 1143 (Del. 2010), yet this Court made no reference to California law when establishing the restriction on the use of the *forum non conveniens* doctrine.

Utilipath. While Appellees call GXP's proposed application of *Ingres* is "borderline frivolous" (Ans. Brf. 35) and "strained" (Ans. Brf. 36), that was the holding of the Court of Chancery in *Utilipath*. Appellees made no effort to explain how the ruling of the Court of Chancery was "borderline frivolous." Adjectives are no substitute for analysis.

GXP does not deny that California is an "appropriate" forum. But, under the terms of the venue provision, so is Delaware and anywhere else.

Appellees argue, without supporting legal authority, that the purpose of a permissive forum provision is to establish that any forum specifically identified is not inconvenient. However, that could be accomplished, while maintaining permissive status, simply by a provision that states "California shall not be deemed an inconvenient forum for litigation," without reference to non-exclusive jurisdiction. The additional words in this case should not be mere surplusage.[3]

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[3] Appellees chide GXP for "carelessly" not addressing the Superior Court's comments questioning how *Ingres* would apply to non-signatories. The Complaint explains how. (A17-21). *Murphy v. Pentwater Capital Management LP*, 2017 WL 5068572 at *3 (Del. Super. Oct. 31, 2017). As the Superior Court's comments were not essential to its resolution of the issue, it constituted *dicta*, and so are not proper to address on appeal. *Helm v. 206 Massachusetts Avenue, LLC*, 107 A.3d 1074, 1077 (Del. 2014) ("because the indemnification clause references by the Superior Court were *dicta*, we do not address that issue in this appeal," italics in the original).

Appellees next argue that there is no explicit waiver of the right to assert the defense of *forum non conveniens*. That is true. However, it is also true that there was no explicit waiver of the defense in the mandatory forum provision in *Ingres.* Rather, this Court determined analytically that *forum non conveniens* was inconsistent with a mandatory forum selection clause. As such, Appellees' argument lacks weight.

Finally, Appellees appear to suggest that GXP is arguing that, under the forum selection provision, Appellees are subject to the jurisdiction of all state and federal courts. (Ans. Brf. 33). GXP is not. GXP reads the oddly-worded provision only as waiving objections to personal jurisdiction in California, but waiving the defense of *forum non conveniens* in any court which has jurisdiction over the parties.

III. THE SUPERIOR COURT MIS-APPLIED THE *FORUM NON CONVENIENS* FACTORS.

Under *Gramercy Emerging Markets Fund v. Allied Irish Banks, P.L.C.*, 173 A.3d 1033 (Del. 2017), does a moving defendant have to show hardship (albeit not overwhelming hardship) or merely minor inconvenience to be entitled to relief? Does evidence which is deemed to have no (or very little) weight under the "overwhelming hardship" standard acquire greater evidentiary force under the *Gramercy* standard? Did the Superior Court err by placing weight on the need to see live in-court testimony of witnesses where those witnesses were either subject to compulsory process or were not located in either California or Delaware? These are questions of law which go to the issue of whether the Superior Court properly applied the *Gramercy* standard. As such, the issues are subject to *de novo* review. *Alexandria City Public Schools v. Handel*, 848 S.E.2d 816, 819 (Va. 2020) ("Whether a lower court has correctly defined and applied a legal standard is a question of law reviewed de novo"); *Hadix v. Johnson*, 228 F.3d 662, 670 (6th Cir. 2000) ("This claim involves determining whether the district court correctly applied the governing legal standard, and we review this legal question de novo"). A review of the factors highlights the point.

1. ***Relative Ease of Access to Proof.*** Although the Superior Court did not find that this factor supported granting relief, Appellees nonetheless argue that this factor supports relief (although they did not file a cross-appeal).

Specifically, Appellees dispute the statements of Delaware's trial courts that, at least in commercial cases, given the ability to transmit large files over the Internet, this factor has no weight in the analysis. They argue that the cases so holding were not decided under the *Gramercy* standard, but make no effort to explain why that should make a difference. If evidence is easy or difficult to obtain or produce, then it will remain so regardless of the legal standard. The only question then is the degree of difficulty. Here, there is no evidence of any difficulty.

Appellees state that it would be easier to obtain evidence if the case were in California, but they do not explain why. Appellees' lawyers have offices in California and Delaware, and members of the California offices are serving in this case.

Appellees next argue that the cases cited by GXP are distinguishable on their facts. Appellees do not explain why the principle for which the cases are cited are fact-specific. That the principle is recognized in several different cases with different facts indicates that it is one of general applicability.

Appellees next argue that *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134 (Del. 2006), does not stand for the proposition for which GXP cited it, specifically that the test under this factor is whether litigating in Delaware would prevent Appellees from being able to introduce evidence. It does. *Id.* at 136 (quoting *Mar-Land Indus. Contractors, Inc. Caribbean Petroleum Refining, L.P.*, 777 A.2d 774, 777 (Del. 2001)). Appellees fail to distinguish between stating a standard and applying the facts to that standard. Appellees here do not identify any pertinent facts. They just rely on the general statement that discovery would be easier in California, without explaining how or the degree of inconvenience. A minor inconvenience should not be sufficient even under *Gramercy.*

2. ***The availability of compulsory process for witnesses.*** In its opening brief, GXP explained how of the three witnesses the Superior Court identified as being important for it to see testify in person because they were "co-conspirators," one is an officer of one defendant who can be compelled to testify in Delaware, the second is a predecessor entity owned and controlled by that same officer, and the third is based in Texas, and so not subject to compulsory process in California as well as Delaware. As such, the lower court erred in failing to take into consideration that the first two witnesses can be haled into a Delaware court, and that the third cannot be haled into a court in either Delaware or California.

Appellees do not respond to those facts, but instead deflect by asking this Court to look at other potential witnesses, some of which are in California and some of which are located elsewhere. But Appellees do not explain why in-court testimony is necessary for these other witnesses, or why video or live online testimony is insufficient. *Mar-Land Indus. Contractors, Inc*., 777 A.2d at 781; *States Marine Lines v. Domingo*, 269 A. 2d 223, 226 (Del. 1970). Absent such information, how is a court to determine the weight of the claim? The Superior Court did not find that live testimony was necessary for those witnesses. Absent such explanation, Appellees' argument is merely conclusory.

3. ***Choice of law.*** Appellees contend that the law is not that the application of non-Delaware law has no weight, but that it has "minimal weight under *Gramercy*." (Ans. Brf. 22). This is a semantic distinction without a practical difference. According to the Superior Court, the test remains hardship (even if not overwhelming hardship), not just mere inconvenience. *GXP Capital, LLC v. Argonaut Manufacturing Services, Inc.*, 234 A.3d 1186, 1196 (Del. Super. 2020). If Delaware courts can easily apply California law under an "overwhelming hardship" standard, it cannot be said that it will be harder to do so under a *Gramercy* standard. As such, it makes no sense to say the application the law of a sister state supports relief under *Gramercy.*

4. ***All other practical problems that would make the trial easy, expeditious and inexpensive***.

a. ***Connection to Delaware***. In its opening brief, GXP pointed to decisions of this Court indicating that the fact that the only connection a case has to Delaware is that the Appellees were formed here[4] provides no weight in favor of granting relief under *forum non conveniens*, particularly in commercial litigation.

Appellees merely respond that this is irrelevant because there was no abuse of discretion. If, however, the Superior Court disregarded the pronouncements of this Court indicating that this point should not be given any weight (at least not any meaningful weight), then it is an error of law, or at the very least an abuse of discretion.

b. ***Availability of an Alternative Forum.*** Appellees note that a relevant factor is the availability of an alternative forum. GXP does not deny that the California state courts provide an alternative forum. However, the existence of an alternative forum does not mean that Appellees face meaningful difficulties or suffer hardship from litigating in Delaware.

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[4] Appellees erroneously state that the sole connection to Delaware is that GXP was formed here. (Ans. Brf. at 2). GXP is a Nevada entity. It is the Appellees who were formed in Delaware.

c. ***Delaware's interest in regulating the conduct of its citizens.*** As noted in GXP's opening brief, this Court has stated that Delaware has an interest in "mak[ing] available to litigants a neutral forum to adjudicate commercial disputes against Delaware entities, even where the dispute involves foreign law and the parties and conduct are centered in a foreign jurisdiction." *Candlewood Timber Group, LLC v. Pan-American Energy*, 859 A.2d 989, 1000 (Del. 2004). Thus, Delaware's interest extends beyond corporate governance cases to commercial disputes.

Appellees' response is merely to parrot back the words of the Superior Court that this interest "can be outweighed by the hardship occasioned from other factors visited on those who appear to have been brought here for vexatious, harassing, or oppressive reasons," *GXP Capital, LLC*, 234 A.2d at 1198, and suggest, yet again, that GXP is applying the wrong standard of review.

If the Superior Court acted in contravention of public policy, it is an issue of law subject to *de novo* review. *See Jones v. State Farm Mut. Auto. Ins*., 610 A.2d 1352, 1353 (Del. 1992). Further, if the Superior Court's decision was based, in part, on its view that GXP acted vexatiously, for harassment or for oppressive reasons, in the absence of evidence or findings, the issue is the existence of evidence, not the weight or sufficiency of the evidence. *See Lemons v. State*, 32 A.3d 358, 361 (Del. 2011) (review of whether evidence is legally sufficient to support a conviction is *de*

novo); *Naylor Medical Sales & Rentals, Inc. v. Invacare Continuing Care, Inc. Eyeglasses*, 517 Fed.Appx. 443, 450 (6th Cir. 2013) (where a party contests the sufficiency of the evidence supporting the district court's findings following a bench trial, the review is *de novo*). Even if not *de novo*, it would be a clear abuse of discretion.

d. ***Judicial Economy***. Appellees argue that this favor supports the decision of the trial court. In support, Appellees reiterate the fact that there witnesses in California and the consequences will not be felt in Delaware. (Ans. Brf. 24). However, the "judicial economy" factor applies to situations where there is another case pending in another jurisdiction. *See Ison v. E.I. DuPont de Nemours and Co., Inc.*, 729 A.2d 832, 845 (Del. 1999). In this case, there is nothing indicating that the burdens on the Superior Court will be any different or greater than those on a California court. Absent supporting evidence, the Superior Court erred to the extent it relied on judicial economy.

IV. COURTS SHOULD NOT WEIGH COMPARATIVE BURDENS BEFORE DETERMINING WHETHER A DEFENDANT HAS SATISFIED THE REQUIREMENTS FOR RELIEF UNDER *FORUM NON CONVENIENS*.

Appellees agree with GXP that neither of the parties raised or brief this issue below. As such, the Superior Court appears to be seeking an advisory opinion. Nonetheless, in the event the Court deems that a resolution of this issue is in the interest of judicial economy, GXP responds to Appellees' argument, which is that there should be a balance of hardships test because this is a *Gramercy* case. But Appellees offer no explanation why the different standards should free a moving defendant from its burden of proof.

Generally speaking, all cases have burdens of proof. As a general rule, in the absence of a presumption, the burden of proof generally rests upon the party asserting a fact the existence of which is essential to the party's claim. *See Oberly v. Howard Hughes Medical Inst.*, 472 A.2d 366, 386 (Del. Ch. 1984); *Murphy v. T. B. O'Toole, Inc.*, 87 A.2d 637, 638 (Del. Super. 1952). In *forum non conveniens* cases, "[t]he burden of proof always rests on the movant, but the degree of that burden will vary, depending upon whether 'there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same

issues....'" *Hurst v. General Dynamics Corp*., 583 A.2d 1334, 1337-38 (Del. Ch. 1990).

If there is a burden of proof in *forum non conveniens* cases where complaints are first-filed in Delaware and cases where they are not, then there is no reason why it would not be equally so in a *Gramercy* case. Thus, only once a defendant meets its burden of proof, whatever it may be, does a court need to compare the hardships of the two sides. Appellees disagree, but their only rationale is that the *Gramercy* standard is different, with absolutely no explanation as to how or why that matters.

CONCLUSION

WHEREFORE, for the foregoing reason, as well as the reasons stated in its Opening Brief, Plaintiff-Below/Appellant GXP Capital, LLC, respectfully requests that this Court reverse the decision of the Superior Court and remand this case for further proceedings.

Respectfully submitted,

/s/ David L. Finger
David L. Finger (ID #2556)
Finger & Slanina, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525
Attorney for Plaintiff-Below/Appellant
GXP Capital, LLC

Dated: December 22, 2020