

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

KEVIN OBARSKI,

Plaintiff,

v.

PHILIP R. SHAWE,

Defendants.

Civil Action File No. 2016CV275799

**ORDER GRANTING MOTION TO INTERVENE
AND GRANTING MOTION TO ADD PARTIES**

The above styled matter is before the Court on Plaintiff's Motion to Add Parties and Elizabeth Elting's ("Elting") Motion to Intervene for Limited Purpose of Opposing Plaintiff's Motion to Add Parties ("Motion to Intervene"). Having considered the record, the Court finds as follows:

(1) Elizabeth Elting's Motion to Intervene

In her Motion to Intervene, Elting who was previously dismissed from this action for lack of personal jurisdiction, moves to intervene for the limited purpose of opposing Plaintiff's Motion to Add Parties. Pursuant to O.C.G.A. §9-11-24, the Court GRANTS Elting's Motion to Intervene and will consider her brief, Intervenor Elizabeth Elting's Opposition to Plaintiff's Motion to Add Parties ("Opposition Brief"), attached thereto.

(2) Plaintiff's Motion to Add Parties

Plaintiff seeks leave of Court to add TransPerfect Global, Inc. ("TransPerfect") as a Defendant and to, again, add Elting as a Defendant based on, *inter alia*, Defendant Shawe's prior pleadings and the allegations in Plaintiff's proposed Amended Complaint. O.C.G.A. §9-11-21 provides: "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." The purpose of the foregoing statute "is to provide procedural relief for plaintiffs who sue too many or too few parties, so that '[m]isjoinder of parties is not ground for

dismissal of an action.” Young v. Rider, 208 Ga. App. 147, 148, 430 S.E.2d 117, 118 (1993) (citing O.C.G.A. §9-11-21).

Among the factors to be considered by the trial court in determining whether to allow [an amendment to add a new party] are whether the new party will be prejudiced thereby and whether the movant has some excuse or justification for having failed to name and serve the new party previously. Aircraft Radio Systems, Inc. v. Von Schlegell, 168 Ga.App. 109, 111 (2), 308 S.E.2d 211 (1983)... The moving party carries the evidentiary burden regarding these factors... Delay alone, however, is an insufficient ground for denying the addition of parties.

Western Sky Fin., LLC v. State ex rel. Olens, 300 Ga. 340, 357-58, 793 S.E.2d 357, 372 (2016), reconsideration denied (Dec. 8, 2016).

Here, Plaintiff asserts TransPerfect is a necessary party because the TransPerfect shares he claims to be owed were, according to Defendant Shawe, to be issued directing from TransPerfect.¹ In her Opposition Brief, Elting opposes the addition of TransPerfect. However, Elting lacks standing to present such argument on behalf of TransPerfect or its court-appointed custodian, who is aware of this pending action. Further, to the extent the opposition is premised on the alleged failure of the amended complaint to state a claim against TransPerfect, on a motion to add new parties the Court is not authorized to consider the substantive merits of the claims against those parties. See Benedek v. Bd. of Regents of Univ. Sys. of Georgia, 332 Ga. App. 573, 575, 774 S.E.2d 150, 152 (2015).

Rather, the Court may consider the factors summarized above; namely, the issue of prejudice and the movant’s asserted justification for the subsequent addition of parties. Id.; Western Sky Fin., 300 Ga. at 357. Given that TransPerfect’s custodian has been aware of this action since June 13, 2016, fact discovery is ongoing, and it does not appear that any applicable statute of limitations has expired, the Court finds no prejudice to TransPerfect in granting the motion. See Western Sky Fin., 300 Ga. at 358 (“[W]here the

¹ It is undisputed TransPerfect maintains an office in Fulton County, Georgia and is authorized by the Georgia Secretary of State to transact business in Georgia. See Complaint, ¶4; Defendant Elizabeth Elting’s Answer, ¶4; Answer of Defendant Philip R. Shaw, ¶4. Thus, TransPerfect is subject to the jurisdiction of Georgia courts. See Allstate Ins. Co. v. Klein, 262 Ga. 599, 601, 422 S.E.2d 863, 865 (1992) (“A corporation which is ‘authorized to do or transact business in this state at the time a claim’ arises is a ‘resident’ for purposes of personal jurisdiction over that corporation in an action filed in the courts of this state. As a resident, such a foreign corporation may sue or be sued to the same extent as a domestic corporation”) (citation and footnote omitted).

statute of limitation has not expired as to the plaintiff's theory of recovery, a new party's rights to a defense on the merits is not prejudiced") (citation omitted). Further, Plaintiff has shown some excuse or justification in not originally naming TransPerfect as a Defendant in that the proposed joinder of the company is the result of Shawe and Elting's pleadings and positions taken in this action after its initiation. Notably, among his claims, Plaintiff seeks declaratory relief as to his alleged ownership interest in TransPerfect as well as injunctive relief, seeking to enjoin the sale of TransPerfect until Plaintiff's ownership rights have been adjudicated. Given these claims and the relief sought, the Court finds joinder of TransPerfect is proper pursuant to O.C.G.A. §§ 9-11-19, 9-11-20 and 9-11-21.

Based on the joinder of TransPerfect and Plaintiff's proposed Amended Complaint, the Court is compelled to find the Motion to Add Parties should be granted as to Elting under the primary participant analysis. While "a company's contacts with a forum that are independent of an individual employee's contacts with the same forum are not to be aggregated against the individual employee for purposes of the minimum-contacts analysis,... the conduct in which the individual employees personally and actually engage as part of their employment duties does count against them in spite of the fact that they engaged in the activities as employees of a business entity." Amerireach.com, LLC v. Walker, 290 Ga. 261, 267, 719 S.E.2d 489, 495 (2011), as amended on denial of reconsideration (Dec. 8, 2011) (citing In re Teknek, 354 B.R. 181, 194(A)(1) (Bankr.N.D.Ill.2006); Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)). As held by the Supreme Court of Georgia in Amerireach.com:

[E]mployees of a corporation that is subject to the personal jurisdiction of the courts of the forum may themselves be subject to jurisdiction if those employees were primary participants in the activities forming the basis of jurisdiction over the corporation... Personal jurisdiction over [such an employee] would extend at least as far as matters relating to the activities of the ... corporation [] in the forum in which he was a primary participant. [Cits.] Application to Enforce Administrative Subpoenas Duces Tecum of the Securities and Exchange Commission v. Knowles, 87 F.3d 413, 418(II)(B) (10th Cir.1996). This "primary participant" requirement is itself a sufficient constitutional due process protection of corporate employees and officers. It meets the mandate that [e]ach defendant's contacts with the forum State must be assessed individually...

Amerireach.com, 290 Ga. at 267–68 (rejecting fiduciary shield doctrine and finding personal jurisdiction over individual members of LLC under primary participants analysis where members “directly facilitated” LLC’s transactions in Georgia resulting in the unlawful conduct set forth in the complaint).

Here, Elting is a co-founder, co-CEO, and a principal shareholder of TransPerfect who helped establish the Atlanta office wherein Plaintiff served as a Senior Vice President of Sales, helped oversee the Atlanta office, and negotiated and executed contracts on TransPerfect’s behalf related to its operations in Georgia. Plaintiff alleges he was promised stock in TransPerfect in exchange for his increasing the revenue of TransPerfect’s Atlanta office. Given the addition of TransPerfect and Plaintiff’s amended pleadings, the Court finds the exercise of personal jurisdiction over Elting is proper under the principal participant doctrine and, in light of the foregoing and Elting’s involvement in the operations of TransPerfect in Georgia, assertion of personal jurisdiction over Elting comports with traditional notions of fairness and substantial justice so as to satisfy due process. Although Elting alleges she has been prejudiced by having to re-defend this lawsuit based on the addition of TransPerfect, as noted above, insofar as she has participated in this action since its initiation, fact discovery is ongoing, and no applicable statute of limitations has expired, the Court does not find any prejudice such as would preclude joinder.

Accordingly, Plaintiff’s Motion to Add Parties is hereby GRANTED and TransPerfect and Elting are added as Defendants in this action. Plaintiff is directed to file and serve its amended pleading in accordance with Georgia law.

SO ORDERED this 3rd day of November, 2017.


Melvin K. Westmoreland, Senior Judge
Metro Atlanta Business Case Division
Fulton County Superior Court
Atlanta Judicial Circuit

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