

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

GREG JACOBSON,)
a California Citizen,)
)
Plaintiff,)
)
v.) C.A. No. 17684
)
DRYSON ACCEPTANCE CORP.,)
a Delaware Corporation, and)
MICHAEL DRY, a Texas Citizen,)
)
Defendants.)

MEMORANDUM OPINION

Submitted: November 9, 2001
Decided: January 9, 2002

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Attorneys for Plaintiff.

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Delaware, *Attorneys for Defendants.*

LAMB, Vice Chancellor.

I.

Greg Jacobson brings this action against Michael Dry' and **Dryson** Acceptance Corp. (“DAC, ” “the corporation, ” or “the company”), a Delaware corporation with its principal place of business in Texas. DAC is a mortgage warehousing company that originated and held mortgage loans in order to sell them later at a lower discount to the secondary mortgage market.

In late 1997, Dry and Jacobson agreed to form DAC as a special purpose corporation and agreed that Jacobson would be employed by DAC to run day-to-day operations. Dry and Jacobson both were officers and directors of DAC from the time of its formation in early January 1998. At that time, all relevant corporate documents were prepared to reflect 100 % share ownership by Dry. Jacobson was aware of this fact.

Around December of 1998, **DAC's** bank indicated it would not renew its lending commitment when it expired in February 1999. In searching for a new lender for DAC, Jacobson came into contact with a California-based company

¹ Service of process was obtained over Dry pursuant to 10 **Del. C. § 3** 114. Consequently, the court lacks jurisdiction to hear claims brought against him solely in his individual capacity. See, **e.g., Hana Ranch, Inc. v. Lent**, Del. Ch., 424 A.2d 28, 30-31 (1980) (limiting the scope of personal jurisdiction obtained pursuant to § 3 114 “only to those actions . . . against a director of a Delaware corporation for acts on his part performed only in his capacity as a director”).

that offered him a job. Jacobson accepted the job offer and moved to California, resigning from DAC in April 1999. In 1998, he had been paid approximately \$250,000 in salary and bonus. In 1999, he received \$40,000 in compensation. Jacobson was removed as a director of DAC at a meeting of shareholders held on May 21, 1999. The DAC board then removed him as an officer of the corporation.

Jacobson claims that he invested \$100,000 of the \$1,000,000 of equity needed to capitalize DAC and that he and Dry agreed that (i) Jacobson would receive 10% of the stock and (ii) DAC's documents would be later amended to reflect Jacobson's 10% ownership. Dry claims that he alone put up all \$1,000,000 of the equity financing for DAC and denies any agreement to issue shares to Jacobson. These conflicting versions of DAC's capitalization form the crux of the principal issue in this case. Jacobson also claims that he is owed another 10% of DAC's stock in exchange for a 50% interest in a piece of real property he transferred to Dry in February 1998. Dry acknowledges receipt of the real property but denies having made any agreement to issue stock in exchange for it.

Jacobson's complaint also alleges that between January 1998 and April 1998 he loaned approximately \$20,000 to DAC that has not been repaid. He

also alleges that, in contrast, Dry was repaid for all loans he made to DAC. Dry has introduced substantial evidence showing that Jacobson loaned a total of \$242,000 to DAC in 1998, all of which was repaid. This evidence is unrebutted.

There is also an issue in the litigation concerning **Dryson Mortgage Finance Corporation** (“DMFC”), an entity in which Dry and Jacobson each held an indirect 50% interest. Shortly after the formation of DAC, the assets of DMFC were transferred to DAC. Jacobson’s complaint alleged that this transfer was made without consideration to DMFC and that he is entitled to be compensated for his 50% stake in DMFC. The defendants buttress their motion for summary judgment with evidence showing that Jacobson approved the transactions between DAC and DMFC, DAC assumed liabilities as well as assets of DMFC, and all transactions between the two entities were properly accounted for by DAC.

Jacobson’s complaint alleges that he demanded payment from Dry for the amounts he claims are due to him around July 1999. There followed a series of demands on Jacobson’s part—including two letters to Dry in September 1999 and a third dated November 15, 1999—for an accounting from DAC and payment of the moneys he believed were owed him.

On December 17, 1999, Jacobson filed this complaint naming Dry and DAC as defendants. The complaint is alleged in 8 counts, as follows:

- Count I: Specific Performance against DAC
- Count II: Accounting against DAC
- Count III: Books and Records Demand against DAC
- Count IV: Breach of Fiduciary Duty against Dry
- Count V: For Collection against DAC
- Count VI: Conversion against DAC
- Count VII: Conversion against Dry
- Count VIII: Breach of contract against DAC

On February 11, 2000, Dry and DAC jointly answered and counterclaimed against Jacobson, alleging that during his employment at DAC Jacobson (i) facilitated the placement of improper loans with DAC, (ii) failed to adhere to the company's policies and procedures for verifying loans causing DAC to make loans it otherwise would not have made and on which it lost money, and (iii) left DAC to work for a competitor and attempted to bring DAC customers with him in contravention of his employment agreement. Based on these factual allegations, DAC and Dry counterclaim for breach of fiduciary duty, fraud, breach of contract, and negligence. As noted above, although Jacobson moved

for summary judgment on these counterclaims, the state of the record is such that summary judgment is inappropriate.*

II.

Pursuant to Court of Chancery Rule 56, summary judgment should be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.³ In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party and the moving party has the burden of demonstrating that no material question of fact **exists**.⁴ “When a moving party has properly supported its motion, however, the non-moving party must submit admissible evidence sufficient to generate a factual issue for trial or suffer an adverse judgment.”⁵ I will apply this standard to the analysis of Dry and **DAC’s** motion for summary judgment.

² Jacobson submitted affidavits in support of his motion that contradict the material allegations of the counterclaims. DAC and Dry, responded with affidavits substantiating their claims. Given the many material factual matters remaining to be decided, summary judgment on them is clearly unwarranted.

³ **See, e.g., Williams v. Geier**, Del. Supr., 671 A.2d 1368, 1375 (1996).

⁴ **Tanzer v. International General Industries, Inc.**, Del. Ch., 402 A.2d 382, 385 (1979) (citing **Judah v. Delaware Trust Co.**, Del. Supr., 378 A.2d 624, 632 (1977)).

⁵ *Id.*; Ch. Ct. R. 56(e).

Jacobson’s claims focus on a series of transfers of funds made by him to DAC. These transfers are said to support his claims for the initial 10 % stock interest and for moneys owed on account of loans to DAC. Having examined the testimony and documents relating to these fund transfers, I conclude that only one of them—the January 5, 1998 transfer of \$100,000 from Jacobson to **DAC**—remains unexplained and gives rise to a triable issue of fact. In all other respects, the undisputed record establishes that whatever moneys were advanced by Jacobson to DAC were promptly repaid and were not accounted for as capital contributions by **DAC**.⁶ The following chart summarizes the evidence of such moneys presented by Jacobson, the evidence adduced by DAC and Dry to rebut Jacobson’s claim, and whether I find that a triable issue remains for each item:

<i>Amount / Date</i>	<i>From / To</i>	<i>DAC Rebuttal</i>	<i>Finding</i>
\$100,000 / 1-5-98	Jacobson’s Account/ DAC Account	Not recorded on DAC’s books; Dry testimony that Jacobson paid money to Dry to induce his participation in DAC.	Evidence of payment of funds to DAC is inconsistent with Dry’s testimony that moneys were paid to him personally; no evidence that funds were later transferred to Dry; triable issue of fact; Summary Judgment denied.

⁶ While the amounts reflected in Jacobson’s bank statements and the DAC general ledger do not match exactly, Jacobson has neither rebutted defendants’ explanations nor established which amounts on his list were not repaid.

<i>Amount /Date</i>	<i>From / To</i>	<i>DAC Rebuttal</i>	<i>Finding</i>
\$100,000 / 1-7-98	Jacobson's Account/ DAC Account	Booked by DAC as an advance from Jacobson. Full amount repaid between 2/20/98 and 6/30/98 .	Unrebutted evidence that Jacobson repaid; no triable issue of fact; <i>Summary Judgment granted.</i>
\$142,000 / 1-15-98	Jacobson's Account/ DMFC Account (booked to DAC)	Booked by DAC as an advance from Jacobson. Full amount repaid on 2/28/98 .	Unrebutted evidence that Jacobson repaid; no triable issue of fact; <i>Summary Judgment granted.</i>
<i>\$240,000 /</i> 3-18-98 & 4-20-98	Jacobson's Account/ DMFC	Payment relates to purchase by Jacobson as individual of loans from DAC.	Unrebutted evidence that Jacobson received loans in exchange; no triable issue of fact; <i>Summary Judgment granted.</i>

Thus, the purpose and treatment of the \$100,000 transfer from Jacobson to DAC made on January 5, 1998 is the only issue of fact left for trial relating to Jacobson's funding of DAC.⁷ Jacobson claims that this transfer represents his initial equity contribution to DAC that, by the terms of his oral agreement with Dry, entitled him to 10% of the DAC common stock.

⁷ Jacobson also complains of an "undefined offset" of **\$22,309.55** which appears on DAC's General Ledger. It is clear from the unrebutted record that this amount represents a payment mistakenly made by a third party to DAC for loans that had been acquired by Jacobson personally from DAC. The Affidavit of Ronald C. Sipes, submitted August 31, 2001, shows that DAC paid this amount to Jacobson and treated it as a pass-through on its books. In other words, the payment of this money to Jacobson did not reduce the amounts due to Jacobson on account of his advances to DAC.

In their briefs in support of their motion for summary judgment, DAC and Dry present substantial evidence that the initial \$100,000 from Jacobson was not a capital contribution to DAC but, rather, a personal payment to Dry. Dry's story is that the January 5, 1998 transfer of \$100,000 was to help defray DAC's start-up costs, and to entice him to invest at all. This evidence is, of course, consistent with the formation of DAC with Dry as the sole stockholder, and the failure of DAC to reflect this payment on its books as a capital contribution. The conclusion DAC and Dry ask me to draw is also buttressed by the substantial evidence that Jacobson was personally involved in the process of documenting DAC's incorporation and start-up and made no objection (other than, he says, to Dry) about the failure to reflect his 10% share ownership. Finally, there is evidence from several other witnesses to the effect that, over the time he remained at DAC, Jacobson never publicly expressed the view that he was (or had the right to be) a DAC stockholder.

I recognize that this evidence substantially negates the existence of any understanding that Jacobson would be a stockholder of DAC. There is also substantial evidence showing Jacobson's knowledge that Dry was to be and, in fact, became the sole record stockholder of DAC. Nevertheless, I conclude that the issue of Jacobson's right to stock ownership cannot be resolved by summary

judgment, for several reasons. First, the record on this motion shows that the January 5, 1998 transfer was made from Jacobson's account to the account of DAC, not Dry. DAC and Dry have not explained what happened to that money thereafter. Instead, the argument presented in their opening and reply briefs is based on the premise that the \$100,000 was paid to Dry, not to DAC. This may prove to be true, but I cannot accept it as true 'on the current record, since the only evidence before me shows that the funds were, at least initially, transferred to DAC.⁸ Second, I am not satisfied with the record explanation by DAC or Dry regarding Jacobson's transfer to Dry of a 50% ownership interest in a piece of real estate.⁹ At this stage of the proceeding, I must regard that transfer as supporting an inference favorable to Jacobson's claim that he bargained for and obtained a promised interest in stock.

⁸ In his affidavit submitted on November 9, 2001, in conjunction with Defendants' Response to Plaintiffs Supplemental Submission, Dry suggests that the January 5, 1998 payment by Jacobson was treated by DAC as a contribution by Dry. This may be taken as a concession that the funds were paid to DAC, not Dry. The subsequent treatment of the payment as though it had been made by Dry is not necessarily inconsistent with Dry's explanation, but it does require some further analysis or explanation.

⁹ At footnote 9, page 9 of their opening brief in support of summary judgment, DAC and Dry state that Jacobson transferred this interest to Dry in February 1998 "in order to increase his potential participation in any proceeds from a sale of DAC." They further state that this transfer "was not a contribution or advance to DAC and is not reflected anywhere on it[s] financial statements as such."

For the foregoing reasons, I will deny defendants' motion for summary judgment as to Counts I and II insofar as they relate to the claim that Jacobson is entitled to receive a 20% stock interest in DAC. I note Dry's objection to this court's exercise of personal jurisdiction over him beyond the scope of that authorized by 10 **Del. C. § 3 114**. Of course, the relevancy of that objection will be evaluated in light of cases holding that, "once personal jurisdiction is properly obtained under the statute, a nonresident director is properly before the court for 'any and all relief that might be necessary to do justice between the parties. '"¹⁰

Summary judgment will be entered in favor of the defendants as to Count V because the record shows conclusively that all other sums advanced by Jacobson to DAC have been repaid. Similarly, judgment is appropriate as to Counts VI and VII, which counts relate, in addition, to the alleged conversion of the assets of DMFC. The record on this motion shows that Jacobson was aware of and consented to the transactions between DAC and DMFC and that those transactions have been accounted for on the books of DAC. Nevertheless; no aspect of this judgment is meant to settle the accounts between DAC and DMFC,

¹⁰ Donald J. Wolfe, Jr. & Michael A. Pittenger, **Corporate And Commercial Practice In The Delaware Court Of Chancery**, § 3.5[a][2] at 3-60, and n.360 (2000) (hereafter "Wolfe & Pittenger") (quoting from **Bans v. MDR Liquidating Corp.**, Del. Ch., CA. No. 9630, Hartnett, V.C. (Jan. 10, 1990), mem. op. at 15).

to determine whether sums are owing to DMFC from DAC or anyone else, or to determine Jacobson's entitlement to any distribution upon the liquidation of DMFC.

III.

There remain Counts II (Accounting as to DAC), III (Books and records against DAC), IV (breach of fiduciary duty against Dry), and VIII (breach of contract against DAC). These are addressed briefly, as follows:

A. Accounting against DAC

Jacobson seeks an accounting against DAC. An accounting is an equitable remedy that consists of the adjustment of accounts between parties and a rendering of a judgment for the amount ascertained to be due to either as a result.” In this case, the threshold question is whether a sufficient relationship exists between DAC and Jacobson to support the imposition on DAC of a duty in equity to account to Jacobson.¹² Although the relationship between an employer and an employee is not sufficient for this purpose,¹³ the relationship of a

“See, e.g., Wolfe & Pittenger, **Delaware Chancery Court Practice**, § 12-6 at 12-63 and n.293 (2000).

¹² **Cheese Shop Int'l v. Steele**, Del. Ch., 303 A.2d 689, 690, *rev'd on other grounds*, Del. Supr., 311 A.2d 870 (1973).

¹³ **Id.** at 691 n.1 (citing **Ball v. Harrison**, 50 N.E.2d 31 (1943)).

corporation and its board of directors and a stockholder of the corporation presumably is. Thus, for the same reasons that I am unable to grant summary judgment on the claims that Jacobson is entitled to shares of DAC stock, defendants' motion for summary judgment on this count of the complaint must also be denied. If, at trial, I conclude that Jacobson has no enforceable right to stock, the action for an accounting will also fail.

B. Demand to Inspect Books and Records

Jacobson has made a books and records demand against DAC, pursuant to 8 *Del. C.* § 220(d), premised on his status as a director of DAC. As noted, Jacobson was removed as a director of DAC at a meeting on May 21, 1999, and, as a result, lost his standing to pursue his claim under Section 220(d).¹⁴ In the circumstances, summary judgment will be entered on this claim in favor of DAC.

C. Breach of Fiduciary Duty

Jacobson claims that Dry has breached his fiduciary duty to Jacobson by manipulating the corporate machinery of DAC so as to deny Jacobson stock certificates representing his 20% ownership in DAC, and by failing to make distributions to Jacobson as 20% shareholder in DAC. This claim, like others,

¹⁴ *Everett v. Transnation Development Corp.*, Del. Ch., 267 A.2d 627, 630 (1970).

depends on Jacobson's status as a stockholder of DAC. Because that issue must go to trial, defendants' motion for summary judgment on this claim is denied.

D. Breach of Contract

Jacobson claims breach of contract against DAC because it, through Dry, contracted to pay Jacobson an annual salary of \$60,000 and 20% of **DAC's** profits and never did. The first part of this claim relies on the premise that Jacobson was entitled to a \$60,000 annual salary. Jacobson and Dry concur that they had initially agreed upon this base pay. However, during the spring of 1998, another DAC employee was promoted to handle the day-to-day operations of the company and some \$20,000 of Jacobson's annual salary was used to pay her salary.

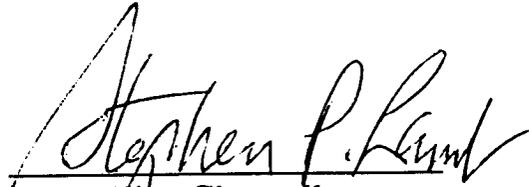
Dry states that at the time Jacobson was removed from being the head of operations at DAC, they agreed that his salary would have to be scaled back if he wanted profit participation. Dry states that he offered Jacobson a salary of \$40,000 and 20% of whatever salary Dry took in a given year with a ceiling in the range of \$200,000 to \$250,000. Dry further states that this \$200,000 to \$250,000 was understood to be the total compensation Jacobson was seeking during his employment at DAC, other than in the event that DAC was sold.

Jacobson had a different understanding of their agreement. Jacobson states that he was entitled to (i) \$60,000 base pay per year, (ii) 20% of the profits of DAC based on his equity interest in the company, and (iii) an additional 10 % of the profits of DAC as a bonus kicker. So, as Jacobson explains it, the \$240,000 he was paid in 1998 represented 20% of the company's net profits but did not include either the \$60,000 salary or the 10% end of year bonus to which he believes he was entitled.

The evidence indicates that Jacobson received approximately \$250,000 in salary and bonus in 1998 and \$40,000 for four months work in 1999. Because there remain questions of fact regarding the agreement which Dry and Jacobson reached over Jacobson's compensation and whether or how the promotion of another DAC employee altered that agreement, I cannot grant summary judgment. Thus, Jacobson's breach of contract claims must also go to trial.

IV.

For these reasons, I hereby grant summary judgment in favor of DAC and Dry on Jacobson's Books and Records, Collection, and Conversion claims (Counts III, V, VI, and VII). Material issues of fact still exist regarding the remaining claims; therefore, summary judgment is denied as to Counts I, II, IV, and VIII. Furthermore, plaintiffs motion for summary judgment on the counterclaims is denied. IT IS SO ORDERED.


Vice Chancellor