

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GOVERNMENT DEVELOPMENT BANK : CIVIL ACTION  
FOR PUERTO RICO, et al., :  
Plaintiffs :  
 :  
v. :  
 :  
HOLT MARINE TERMINAL, INC., :  
et al., :  
Defendants : NO. 02-7825

MEMORANDUM AND ORDER

McLaughlin, J.

September 14, 2004

The plaintiffs in this action are the Government Development Bank for Puerto Rico ("GDB") and the Puerto Rico Maritime Shipping Association ("PRMSA"). The plaintiffs allege that the defendant corporations are liable for NPR, Inc.'s ("NPR") withdrawal liability under 29 U.S.C. § 1381 of the Multiemployer Pension Plan Amendments Act ("MPPAA") of 1980, 29 U.S.C. § 1381 et seq. (amending provisions of Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq.).

The plaintiffs have moved for summary judgment against one of the defendants -- Orchard Hill Development Corporation ("Orchard Hill"). The Court will grant in part and deny in part the plaintiffs' motion.

I. Facts

PRMSA is an entity that formerly was engaged in the shipping business. It had utilized longshoreman services at the

Port of Elizabeth, New Jersey. As a result, PRMSA was required to pay into the New York Shipping Association International Longshoreman's Association Pension Fund ("Fund"), a multi-employer pension plan governed by ERISA. Compl. ¶¶ 7, 9.

In February 1995, PRMSA sold its assets to NPR. PRMSA remained secondarily liable in the event that NPR withdrew from the Fund within a five-year period and failed to satisfy its withdrawal liability to the Fund. The Puerto Rican legislature required GDB to cover the existing liabilities of PRMSA, including PRMSA's potential withdrawal liability to the fund. On April 23, 1997, the plaintiffs, NPR, and the Fund entered into an agreement which provided that the plaintiffs would be jointly and severally liable for payment up to a specified amount in the event that NPR failed to pay all or any portion of its ERISA withdrawal liability. Compl. ¶¶ 10, 11; Pls.' Mot. for Summ. J. (hereinafter "Pls.' Mot."), Ex. 1A.

Holt Cargo Systems, Inc. ("Holt Cargo") purchased NPR on September 25, 1997. Holt Cargo assigned its interests in NPR to the Holt Group on November 20, 1997. Pls.' Mot., Ex 3.

From November 20, 1997 until NPR's liquidation in 2002, the Holt Group owned 100% of the stock in NPR. Thomas Holt, Sr. ("Holt, Sr.") owned 100% of the stock in the Holt Group. Pls.'

Mot., Exs. 2, 4, 5; Def.'s Opp. to Pls.' Mot. (hereinafter "Def.'s Opp."), Exs. 3, 4.

On January 8, 2001, the Trustees of the Fund ("Trustees") notified NPR of its obligation to pay withdrawal liability on account of a partial withdrawal that occurred on December 31, 2000.<sup>1</sup> Pls.' Reply, Ex. 1. NPR continued to use longshoreman services at the Port of Elizabeth until it ceased operations there on February 23, 2001. Pls.' Mot., Ex. 6. On March 21, 2001, NPR filed for bankruptcy protection and failed to pay its withdrawal liability. On May 3, 2001, NPR requested arbitration of issues relating to its withdrawal liability. On November 21, 2002, NPR formally withdrew its request to arbitrate the issues related to its withdrawal liability. Pls.' Reply, Ex. 3.

On November 29, 2001, the plaintiffs and the Fund entered into a settlement agreement, and the plaintiffs paid the Fund \$15,896,086.00 to satisfy NPR's withdrawal liability. As a part of that agreement, the Fund assigned its rights against NPR to the plaintiffs. Compl. ¶ 14; Pls.' Mot., Ex. B.

Orchard Hill is a Pennsylvania corporation that was in the business of developing construction. Pls.' Mot., Ex. 2 at 85. Leo Holt, Thomas Holt, Jr., and Michael Holt, the sons of

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<sup>1</sup> This calculation was based on NPR's contribution base rates. There was a seventy percent contribution decline in 1998, 1999, and 2000. Def.'s Opp., Ex. H at 6.

Holt, Sr., owned Orchard Hill from February 1, 1993 until August 1, 2000. In 1996, Orchard Hill employed multiple managers, supervisors, and subcontractors. Since August 1, 2000, Holt, Sr. has held 100% of the stock in Orchard Hill. Pls.' Mot., Ex. 7; Def.'s Opp., Ex. C; Pls.' Reply, Ex. 5 at 312-14.

Holt, Sr. testified that Orchard Hill stopped operating in 1998 or 1999. In the year 2000, Orchard Hill was a dormant company. One of Orchard Hill's last construction contracts was the Kaighn Point Project. Holt Hauling and Warehousing ultimately took over the project, because Orchard Hill lacked the financial resources to finish the job. Def.'s Opp., Ex. D at 191, 198-99; Pls.' Reply, Ex. 5 at 199-200.

## II. Analysis

The plaintiffs moved for summary judgment on the ground that Orchard Hill was under common control with NPR pursuant to ERISA, 29 U.S.C. § 1301(b), and is therefore responsible for the withdrawal liability incurred by NPR. Orchard Hill argues that there are issues of fact as to: 1) the date of NPR's withdrawal from the Fund; and 2) whether Orchard Hill was a trade or business at the time of NPR's withdrawal from the Fund.

Under ERISA, as amended by the MPPAA, employers may make contributions to one or more pension plans on behalf of all their employees who belong to a participating union. Congress

enacted the MPPAA, because it found that existing legislation did not sufficiently protect plans from the adverse consequences that resulted when employers withdrew from multiemployer plans.

Flying Tiger Line v. Teamsters Pension Trust Fund, 830 F.2d 1241, 1244 (3d Cir. 1987) (citations omitted).

Under the MPPAA, when a contributing employer withdraws from participation in a fund, the employer is responsible for his share of the unfunded vested liability remaining in the fund at the time of withdrawal. Bd. of Trs. of Trucking Employees of N. Jersey Welfare Fund Inc.-Pension Fund v. Centra, 983 F.2d 495, 498 (3d Cir. 1992) [hereinafter Centra] (citing 29 U.S.C. § 1381(b) (1988)). Not only contributing employers, but also any "trades and businesses . . . under common control" with that employer, are liable to the fund when an employer incurs withdrawal liability. 29 U.S.C. § 1301(b)(1).

The MPPAA incorporates the Internal Revenue Code's ("IRC") controlled group standards for determining whether two related corporations are within a controlled group and are under common control with an employer. 29 U.S.C. § 1301(b); IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 123 (3d Cir. 1986).

The regulations describe different types of controlled groups, which require that the companies be connected through a controlling interest. See 26 U.S.C. § 1563(a); 26 C.F.R.

§ 1.414(c)-2. These groups are defined by the percentage of voting power of stock ownership. 26 U.S.C. § 1563(a). A corporation controls a company when it owns eighty percent of the total value of all outstanding shares. Id.; Centra, 983 F.2d at 502.

The Court will discuss whether Orchard Hill was a trade or business under common control with NPR at the time of NPR's withdrawal from the fund.<sup>2</sup> This question turns on whether two issues are disputed: 1) the date of NPR's withdrawal; and 2) Orchard Hill's status as a trade or business.

A. Date of NPR's Withdrawal from the Fund

Orchard Hill asks the Court to reject the Trustees' determination that NPR partially withdrew from the Fund on December 31, 2000 and find in favor of an earlier date, when Orchard Hill alleges that it was not under common control with

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<sup>2</sup> In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993). A motion for summary judgment shall be granted where all of the evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

NPR.<sup>3</sup> The plaintiffs argue that the date of NPR's withdrawal was explicitly designated for arbitration under the MPPAA. The MPPAA requires arbitration for "any dispute between an employer and the plan sponsor . . . concerning a determination made under sections 1381 through 1399 of [title 29]." 29 U.S.C § 1401(a)(1); see also Flying Tiger Line, 830 F.2d at 1247 ("[W]here the issues in dispute fall within the purview of MPPAA provisions that are explicitly designated for arbitration, the Act's dispute resolution procedures must be followed.").

The timing of complete and partial withdrawals is determined under 29 U.S.C. §§ 1383 and 1385. It is therefore subject to the arbitration requirement. See Central States, Southeast and Southwest Areas Pension Fund v. Bomar Nat'l, Inc., 253 F.3d 1011, 1015 (7th Cir. 2001) (stating that whether and when there has been a withdrawal must be resolved in arbitration under the MPPAA). Orchard Hill contests the date of NPR's withdrawal, but this issue was designated for arbitration under the MPPAA.

Orchard Hill may no longer seek arbitration. Either the employer or the plan sponsor of a multiemployer plan may initiate the arbitration within a sixty-day period after the earlier of the date of notification to the employer or 120 days

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<sup>3</sup> Orchard Hill acknowledges that it was under common control with NPR after Holt, Sr. acquired it in August 2000.

after the employer requests the plan sponsor to reconsider its determination. 29 U.S.C. § 1401(a)(1). The Trustees of the Fund notified NPR of its withdrawal liability obligation on January 8, 2001. On February 2, 2001, NPR requested a review of that determination. The deadline for Orchard Hill to seek arbitration of this issue is therefore past due.

Orchard Hill, however, characterizes its position as follows. It argues that it was never in common control with NPR and was never an employer under the MPPAA. Disputes as to whether a company had ever become an MPPAA employer are properly resolved in the courts, because an entity found not to be an employer is not subject to arbitration under the language of § 1401(a)(1). Doherty v. Teamsters Pension Trust Fund of Philadelphia & Vicinity, 16 F.3d 1385, 1390 (3d Cir. 1994); see also Galgay v. Beaverbrook Coal Co., 105 F.3d 137, 142 (3d Cir. 1997).

The disputes in Doherty and Galgay, however, are distinguishable from the present case. In those cases, the defendants did not challenge the date that the withdrawal occurred. Rather, they maintained that they had never been alter egos of the employer. Doherty, 16 F.3d at 1390; Galgay, 105 F.3d at 141-42. The question of alter ego, unlike the withdrawal date involved in the present case, does not concern a determination made under 29 U.S.C. §§ 1381-1399. When a court decides the

alter ego issue, it does not decide an arbitrable issue and cannot upset any determinations made by the arbitrator. Here, Orchard Hill's sole argument that it was never an employer under the MPPAA is based upon the calculation of the withdrawal date, which is a question for arbitration.

Congress designed the MPPAA to make courts the final forum for dispute resolution. The MPPAA's purpose would be undermined by expense and delay if litigation occurred prior to the Act's arbitration procedures. This Circuit has emphasized the importance of "the legislature's decision that arbitration, and not the courts, is the proper forum for the initial resolution of disputes [under MPPAA]." Flying Tiger Line, 830 F.2d at 1249 (citations omitted).

If the issue of the withdrawal date were not arbitrable, a disturbing result would follow. NPR, as the employer, is required to arbitrate the date of withdrawal. If NPR had chosen to arbitrate issues regarding its withdrawal liability and the arbitrator had confirmed the partial and complete withdrawal dates in 2000 and 2001, and if Orchard Hill could then challenge those dates in court, different withdrawal dates might apply to NPR and Orchard Hill.

Furthermore, the issue at hand is in the scope of the arbitrators' expertise; arbitration is required for disputes concerned with the determination, computation, and collection of

withdrawal liability. See United Paperworkers Int'l Union v. Arlington Sample Book Co., No. 83-2828, 1984 U.S. Dist. LEXIS 16483, \*5 (E.D. Pa. May 23, 1984).

Members of a common controlled group that fail to come forward and request arbitration risk losing the possibility of review and arbitration and risk default.<sup>4</sup> IUE AFL-CIO Pension Fund, 788 F.3d at 129. For these reasons, Orchard Hill cannot contest NPR's withdrawal date, because this issue is subject to ERISA's mandatory arbitration provision.

#### B. Trade or Business

Orchard Hill also contends that a dispute exists as to whether or not it was a trade or business under 29 U.S.C. § 1301(b)(1) at the time of NPR's withdrawal as calculated by the Trustees.

The issue of whether or not Orchard Hill is a trade or business is not determined under 29 U.S.C. §§ 1381-1399. This issue, therefore, is not subject to the mandatory arbitration requirement. 29 U.S.C. § 1401(a); see Connors v. Incoal, Inc., 995 F.2d 245, 249 n.6 (D.C. Cir. 1993); Central States, Southeast

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<sup>4</sup> Notice to the employer serves as constructive notice to all members of a controlled group. IUE AFL-CIO Pension Fund, 788 F.2d at 127. Orchard Hill was on notice that it would be considered a member of the controlled group when the Fund Sponsor notified NPR of its withdrawal liability and the withdrawal date.

and Southwest Pension Fund v. Personnel, Inc., 974 F.2d 789, 792 n.1 (7th Cir. 1992).

Section 1301(b)(1) does not define "trade or business," but states that its terms "shall be consistent and coextensive with regulations prescribed for similar purposes . . . under section 414(c) of the Internal Revenue Code of 1986 [26 U.S.C. § 414(c)]." 29 U.S.C. § 1301(b)(1). The Internal Revenue Code does not contain a general definition for "trade or business." Comm'r of Internal Revenue v. Groetzinger, 480 U.S. 23, 27 (1987).

The courts that have interpreted the trade or business requirement under § 1301(b)(1) have not adopted a rigid construction of the terms. They have undertaken a factual inquiry to determine whether characterizing an enterprise as a "trade or business" will fulfill the underlying purposes of section 1301(b)(1). See, e.g., Connors, 995 F.2d at 250; Personnel, 974 F.2d at 794-96. Section 1301(b)(1) was enacted to prevent employers from avoiding withdrawal liability by fractionalizing their operations. Personnel, 974 F.2d at 794; Western Conference of Teamsters Pension Trust Fund v. Lafrenz, 837 F.2d 892, 894 (9th Cir. 1988).

Courts have also turned to the Supreme Court's definition of trade or business in Groetzinger when interpreting the term in § 1301(b)(1). See, e.g., Connors, 995 F.2d at 250;

Personnel, 974 F.2d at 794; Central States, Southeast & Southwest Areas Pension Fund v. Stroh Brewery Co., 220 B.R. 959, 962 (N.D. Ill. 1997). In Groetzinger, the Court stated that to be engaged in a trade or business, the taxpayer had to be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit. 480 U.S. at 35.

Here, Orchard Hill does not dispute that it was a company that once operated for profit. The evidence shows that Orchard Hill was in the business of developing construction and had multiple employees. The record, however, also contains evidence that Orchard Hill stopped operating in 1998 or 1999 and was dormant in 2000. This raises a question as to whether Orchard Hill was engaging in business activity with continuity and regularity when Thomas Holt, Sr. acquired the company in 2000.

The policy of § 1301(b)(1) is to prevent a company from avoiding liability by shifting its assets into other businesses under its control. When determining what trades or businesses are under common control, the relevant time period must include the time when the alleged trades or businesses are under common control.<sup>5</sup> The time period before two companies are under common

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<sup>5</sup> Courts interpreting § 1301(b)(1)'s "trade or business" requirement look to the time period of common control and generally look at the period before, during, and after withdrawal

control is not relevant to potential asset shifting between those companies, as those businesses are not yet controlled by the same person or persons. Because the plaintiffs offer no evidence about Orchard Hill's activities when Holt, Sr., the owner of NPR, acquired Orchard Hill, summary judgment is not appropriate.

An appropriate Order follows.

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liability is incurred when determining whether entities are a trade or business. See, e.g., Connors, 995 F.2d 245 (looking at the years when two entities were in common control, including years prior to, during, and after withdrawal liability was incurred in determining whether an entity was a trade or business); Personnel 974 F.2d at 794-95; (looking at the years when two entities were in common control, including years prior to, during, and after withdrawal liability was incurred in determining whether an entity was a trade or business); Connors, 907 F.3d 1227 (holding that a partnership which dissolved before withdrawal liability was incurred could not be liable under partnership law).

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HOLT MARINE TERMINAL, INC., :  
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Defendants : NO. 02-7825

ORDER

AND NOW, this 14<sup>th</sup> day of September, 2004, upon consideration of the plaintiffs' Motion for Summary Judgment (Docket No. 40), the responses thereto, and following a hearing on January 13, 2004, IT IS HEREBY ORDERED that the motion is DENIED for reasons set forth in a memorandum of today's date.

BY THE COURT:

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MARY A. McLAUGHLIN, J.