

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

DIANE M. EVERITT, Administratrix	:	CIVIL ACTION
of the Estate of EUGENE C. EVERITT, JR.,	:	
Deceased and DIANE M. EVERITT and	:	
JOSEPH MENSACK and KAREN	:	
MENSACK, h/w and JANE M. PEASE,	:	
Administratrix of the Estate of JOHN T.	:	
PEASE and JESSICA L. PEASE, a minor	:	
by her parent and legal guardian JANE M.	:	
PEASE	:	
	:	
	:	
v.	:	
	:	
	:	
DOVER DOWNS ENTERTAINMENT,	:	NO. 98-6116
INC., DOVER DOWNS PROPERTIES,	:	
INC., DOVER DOWNS INTERNATIONAL	:	
SPEEDWAY, INC. and DOVER DOWNS,	:	
INC.	:	

**MEMORANDUM AND ORDER**

YOHN, J. June , 1999

Plaintiffs sued defendants in the Court of Common Pleas of Philadelphia, for an accident which occurred on defendants' property in Delaware. Defendants timely removed to this court and subsequently filed a motion to dismiss for lack of personal jurisdiction, or in the alternative to transfer to the District of Delaware. Plaintiffs respond that this court has personal jurisdiction over two of the corporate defendants and that the other two corporate defendants are alter egos of those corporate defendants and, therefore, this court has personal jurisdiction over all four defendants. For the reasons stated herein, I find that I do not have jurisdiction over all four defendants, and therefore,

by agreement of counsel, the defendants' motion to transfer to the District of Delaware will be granted.

## I. FACTUAL BACKGROUND

Plaintiffs and plaintiffs' decedents were injured in an accident on May 28, 1998 on real property owned by Dover Downs Properties, Inc. (“Dover Downs Properties”), located in Dover, Delaware. See Complaint, ¶¶ 11, 23-24, 43-46. Plaintiffs and plaintiffs' decedents were camping at the property preparatory to attending a race conducted by Dover Downs International Speedway, Inc. (“Dover Downs Speedway”). See id. at ¶ 23. They paid a fee to utilize the campground and to attend the race. See id. The accident occurred when a flagpole was erected on Eugene Everitt's camper beneath an uninsulated high voltage power line. See id. at ¶¶ 43-44. Flagpoles are customarily used to demonstrate fan support, and defendants knew of and encouraged this practice. See id. at ¶¶ 32-36. The electricity went through the pole and through the bodies of four people who were nearby. See id. at ¶¶ 45-46. John Pease and Eugene Everitt were electrocuted and Diane Everitt and Joseph Mensack were seriously injured. See id. at ¶¶ 32-36.

Plaintiff Diane Everitt, both personally and as representative of Eugene Everitt's Estate, is a citizen of the Middle District of Pennsylvania; plaintiffs Joseph and Karen Mensack are citizens of Maryland; and plaintiff Jane Pease, personally, as representative of John Pease's Estate, and as guardian of her minor daughter, Jessica Pease, is a citizen

of Mississippi.

The defendants, Dover Downs Entertainment, Inc. (“Dover Downs Entertainment”), Dover Downs Properties, Dover Downs Speedway, and Dover Downs, Inc., are all incorporated in Delaware and have their principal place of business in Delaware. Dover Downs Entertainment is a holding company, which owns 100% of the stock of the other three companies: Dover Downs Properties, which holds undeveloped real estate; Dover Downs Speedway, which has motorsports operations; and Dover Downs, Inc., which has gaming and harness racing operations. The two operating companies, Dover Downs Speedway and Dover Downs, Inc., advertise extensively in the Eastern District of Pennsylvania. See Exh. D to Plaintiff's Response at 74-79, Dep. of T. Horne.

This case was instituted when plaintiffs filed a writ of summons in the Philadelphia Court of Common Pleas on October 30, 1998. Defendants then removed the case to United States District Court for the Eastern District of Pennsylvania on November 19, 1998, based on diversity jurisdiction. On December 8, 1998, plaintiffs filed their complaint. Defendants filed a motion to dismiss based on lack of personal jurisdiction, or in the alternative to transfer to the United States District Court for the District of Delaware. The parties then conducted discovery on the issues raised in the motion, which is now ready for disposition.

## II. DISCUSSION

### A. STANDARD OF REVIEW

Once a defendant has raised a jurisdictional defense, the burden shifts to the plaintiff to prove that the relevant jurisdictional requirements are met. See Mellon Bank (East) PSFS, N.A. v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992); Gehling v. St. George's Sch. of Medicine, Ltd., 773 F.2d 539, 542 (3d Cir. 1985). The plaintiff must support this burden through “sworn affidavits or other competent evidence.” North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 689 (3d Cir.), cert. denied, 498 U.S. 847 (1990) (citations omitted). Where the complaint and affidavits are relied upon to satisfy its burden, the plaintiff succeeds by making a prima facie showing that jurisdiction exists. See Friedman v. Israel Labour Party, 957 F. Supp. 701, 706 (E.D. Pa. 1997). “Factual discrepancies created by affidavits are generally resolved in favor of the non-moving party.” Id.; see also Carteret Sav. Bank v. Shushan, 954 F.2d 141, 142 n.1 (3d Cir.), cert. denied, 506 U.S. 817 (1992). In resolving jurisdictional disputes under Rule 12(b)(2), the standards under Rule 12(c) do not apply simply because the court considers affidavits concerning jurisdictional facts. See K.C.P.L., Inc. v. Nash, No. 98-3773, 1998 WL 823657, at \*3 (S.D.N.Y. Nov. 24, 1998).

### B. PERSONAL JURISDICTION

When, as here, a federal court has subject matter jurisdiction over a matter because of the diversity of the parties' citizenship, the court's personal jurisdiction over a

nonresident of the state in which it sits is controlled by the laws of that state. See Fed. R. Civ. P. 4(e); Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 259 (3d Cir. 1998). If the long-arm jurisdictional statute of its forum state permits a court to exercise personal jurisdiction, the court must next determine whether the Due Process Clause of the Fourteenth Amendment limits the exercise of jurisdiction. See id.; Vetrotex Certaineed Corp. v. Consol. Fiber Glass Prod. Co., 75 F.3d 147, 150 (3d Cir. 1996).

Personal jurisdiction may be either specific or general. Specific jurisdiction exists when the cause of action arises from the defendant's forum related activities; while general jurisdiction is present when the defendant engages in such “continuous and systematic” contacts with the forum state that jurisdiction exists for all causes of action against that defendant, even for claims which do not arise from the defendant's forum related activities. See Heliocopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 nn.8-9 (1984); Imo, 155 F.3d at 259. There is no basis for specific jurisdiction here because none of the events which led to this cause of action have any connection to this forum. This court, therefore, will only consider whether it has general personal jurisdiction over the defendants.

Under Pennsylvania's long-arm statute, its courts have general jurisdiction over a foreign corporation if the corporation conducts “a continuous and systematic part of its general business within this Commonwealth.” 42 Pa. Cons. Stat. Ann. § 5301(a)(2)(iii) (West 1981 & Rev. Supp. 1998). Reading this statutory provision in conjunction with the

Fourteenth Amendment's due process requirements, it is clear that this court may only exercise jurisdiction over the defendants if they have at least “certain minimum contacts with [Pennsylvania] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.’” Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). For this court to have jurisdiction, the defendants' contacts with Pennsylvania must suggest that it could “reasonably anticipate being haled into court” here. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The “continuous and systematic” test is rigorous and is “not an easy one to meet.” Surgical Laser Tech., Inc. v. C.R. Bard, Inc., 921 F. Supp. 281, 284 (E.D. Pa. 1996). To meet their burden of demonstrating general personal jurisdiction, plaintiffs must prove that defendants' Pennsylvania contacts are more than “minimal;” those contacts must be “extensive and pervasive.” Reliance Steel Prod. Co. v. Watson, Ess, Marshall & Enggase, 675 F.2d 587, 589 (3d Cir. 1982).

Defendants have acknowledged that Dover Downs, Inc. and Dover Downs Speedway are subject to general jurisdiction in the Eastern District of Pennsylvania. See Defendant's Reply at 6. The only issue with respect to jurisdiction is whether this court has general jurisdiction over Dover Downs Entertainment and Dover Downs Properties. Plaintiffs acknowledge that neither of these two companies directly engages in any conduct in the Eastern District of Pennsylvania which would subject it to general jurisdiction here. See Plaintiff's Response at 1. Plaintiffs contend, however, that Dover

Downs Entertainment and Dover Downs Properties are alter egos of Dover Downs, Inc. and Dover Downs Speedway, which would therefore mean that all four defendants are subject to jurisdiction in this forum. See id.

C. ALTER EGO

Plaintiffs claim that an alter ego analysis demonstrates that this court has personal jurisdiction over all four defendants. Plaintiffs state that because defendants have stipulated to this court's general jurisdiction over Dover Downs, Inc. and Dover Downs Speedway, and because Dover Downs Entertainment and Dover Downs Properties are alter egos of Dover Downs, Inc. and Dover Downs Speedway, general jurisdiction exists for all four defendants in this court. A court may find that a parent company is an alter ego of a subsidiary or that two closely related companies are alter egos, although most of the case law deals with the parent and subsidiary situation.<sup>1</sup> See Ragan v. Tri-County

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<sup>1</sup> The parties do not raise the issue of whether Pennsylvania or Delaware law should be applied to determine whether Dover Downs Entertainment and Dover Downs Properties are alter egos of Dover Downs, Inc. and Dover Downs Speedway. As both Pennsylvania and Delaware apply similar standards to decide when to pierce the corporate veil or to find that corporations are subject to jurisdiction based on an alter ego theory, the court need not resolve this issue. See Pauley Petroleum Inc. v. Continental Oil Co., 239 A.2d 629, 633 (Del. 1968) (explaining that a corporation's veil may be pierced "in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it"); David v. Mast, No. 1369, 1999 WL 135244, at \* 2 (Del. Ch. Mar. 2, 1999) (noting that "persuading a Delaware Court to disregard the corporate entity is a difficult task" but that a corporation's veil may be pierced to avoid legal or equitable fraud, acts in contravention of law, a public wrong, or misuse of the corporate form); Nufarm v. RAM Research, No. 16179, 1998 WL 668648, at \* 4 (Del. Ch. Sept. 15, 1998) (finding that corporations are alter egos to prevent injustice); Irwin & Leighton, Inc. v. W.M. Anderson Co., 532 A.2d 983, 987 (Del. Ch. 1987) (noting that a corporation's veil may be pierced in the absence of fraud when "those in control of the corporate enterprise have not treated it as a distinct legal entity" or have treated it as their "instrumentality").

Excavating, Inc., 62 F.3d 501, 508-09 (3d Cir. 1995) (applying Pennsylvania law).

The burden of proof for establishing alter ego status is on the party asserting that the corporations are alter egos. See Culbreth v. Amosa (Pty) Ltd., 898 F.2d 13, 14 (3d Cir. 1990) (applying Pennsylvania law). Under Pennsylvania law, “there is a strong presumption . . . against piercing the corporate veil.” Lumax Indus., Inc. v. Aultman, 669 A.2d 893, 895 (Pa. 1995); see also In re Estate of Hall, 535 A.2d 47, 54 (Pa. 1987) (using terms alter ego and piercing corporate veil interchangeably); In re Appeal of Community Gen. Hosp., 708 A.2d 124, 130 (Pa. Commw. Ct. 1998) (same). “[T]he general rule is that a corporation shall be regarded as an independent entity even if its stock is owned entirely by one person.” Lumax Indus., Inc., 669 A.2d at 895. The factors to be considered when deciding whether to pierce the corporate veil are: 1) undercapitalization; 2) failing to observe corporate formalities; 3) substantial intermingling of affairs; 4) using the corporate form for fraudulent purposes. See id. Although it is not necessary to show fraud, “[p]iercing the corporate veil is admittedly an extraordinary remedy preserved for cases involving exceptional circumstances.” Village at Camelback Property Owners Assn. Inc. v. Carr, 538 A.2d 528, 533 (Pa. Super. Ct. 1988). As the Camelback court explained, “[i]n deciding whether to pierce the corporate veil, courts are basically concerned with determining if equity requires that the shareholders' traditional insulation from personal liability be disregarded and with ascertaining if the corporate form is a sham, constituting a facade for the operations of the dominant shareholder.” Id.

Thus, the corporate veil will be pierced on a showing of injustice, rather than fraud. See Lycoming County Nursing Home Assn., Inc. v. Commonwealth, Dept. of Labor and Industry, 627 A.2d 238, 244 (Pa. Commw. Ct. 1993). Although the courts have not precisely defined what constitutes “injustice,” the cases where the corporate veil has been pierced have involved using the corporate form to avoid legitimate obligations. See Culbreth, 898 F.2d at 14 (“Pennsylvania [law requires a showing] that the controlling corporation wholly ignored the separate status of the controlled corporation and so dominated and controlled its affairs that its separate existence was a mere sham.”); Village at Camelback, 538 A.2d at 533 (“In deciding whether to pierce the corporate veil, courts are basically concerned with determining if equity requires that the shareholders’ traditional insulation from personal liability be disregarded and with ascertaining if the corporate form is a sham, constituting a facade for the operations of the dominant shareholder.”); Rinck v. Rinck, 526 A.2d 1221, 1223 (Pa. Super. Ct. 1987) (“Where, as here, a corporation has been formed to escape an existing legal obligation, the corporate entity will be ignored.”).

Plaintiffs, in their Sur-Reply to the Motion to Dismiss, state that the Third Circuit upheld the piercing of the corporate veil in Ragan, where there was no allegation of fraud. The facts in Ragan, however, were completely different from those here. In Ragan, the related company, that was determined to be an alter ego, was part of a “family enterprise,” where its only purpose was to provide labor to another family owned business. See

Ragan, 62 F.3d at 506-09. Although the related company had its own officers, those officers knew little of the day-to-day operations of the company. See id. at 506. Thus, it was demonstrated that other parts of the family enterprise were actually running the company. Further, the company was “grossly undercapitalized.” Id. at 506-09. Therefore, although no fraud was demonstrated, the court pierced the corporate veil to avoid injustice.

The facts in the instant case are undisputed, except as noted. Each corporation has a separate function. The four Dover Downs companies have many integrated operations. Cash management is centralized at Dover Downs, Inc., and there are many intercompany transactions. See Exh. D to Plaintiff’s Response at 55, 61, Dep. of T. Horne, CFO.<sup>2</sup> However, intercompany transactions are reflected in the accounts and are eventually accounted for. See id. at 56, 61. Most shared expenses are paid by Dover Downs, Inc. See id. at 26. The operating companies share some functions, such as maintenance, and then allocate the expenses. See id. at 32. Further, the financial statements of the four companies are consolidated, in accordance with Financial Accounting Standards Board rules. See id. at 17-18; Accounting Standards, Financial Accounting Standards Board, June 1, 1994, Statement 94 ¶ 13; see also Savin Corp. v. Heritage Copy Products, Inc.,

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<sup>2</sup> Mr. Horne is the CFO of all four Dover Downs Corporations. See Exh. D to Plaintiff’s Response at 11, Dep. of T. Horne, CFO. He and other officers who work for all companies are paid by Dover Downs, Inc., and none of their time is allocated to Dover Downs Entertainment, the holding company. See id. at 11-15, 98-99, 100-02.

661 F. Supp. 463, 471 (M.D. Pa. 1987) (stating that even though required by law, consolidation is factor favoring alter ego status).<sup>3</sup> The federal tax returns of the four companies are also consolidated. See Exh. H to Plaintiff's Response at 103, Dep. of R. Comollo. The state tax returns for the four companies, however, are filed separately. See id. Also, the companies do maintain books which allocate expenses to the appropriate entity, although de minimis expenses are not allocated and interest is not charged on loans between companies. See Exh. D to Plaintiff's Response at 98-99, 100-02. The companies appear to primarily operate out of Dover Downs, Inc. and Dover Downs Speedway, but this presumably occurs because Dover Downs, Inc. and Dover Downs Speedway are the only two of the companies which currently have operations. See id. For example, Dover Downs Entertainment maintains a line of credit, which the subsidiaries guarantee. See id. at 38-39. Dover Downs Entertainment draws down on the line when necessary for the subsidiaries, but does not use the line for its own uses, since it does not have operations. See id. Additionally, the companies share office space. See Exh. H to Plaintiff's Response at 10.

The four companies, however, observe corporate formalities. See App. 18-19 to

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<sup>3</sup> The Dover Downs corporations are required to consolidate their financial statements, in accordance with the rules of the Financial Accounting Standards Board, which public companies are mandated to follow by the Securities Exchange Commission. See The Mission of the Financial Accounting Standards Board, Financial Accounting Standards Board (visited May 13, 1999) <<http://www.rutgers.edu/Accounting/raw/fasb/facts/fasfact1.html>>.

Defendant's Reply, Aff. of K. Belohoubek, Asst. General Counsel for all Dover Downs Companies. Each company has its own board, although there are many common officers and directors. See id. at 79-89. Further, defendants state that the two operating companies, Dover Downs, Inc. and Dover Downs Speedway, maintain responsibility for their own day to day operations. See id. at 22-23, Aff. of T. Horne. Plaintiffs have not produced any evidence to contradict these claims by defendants.

As the Third Circuit has explained, to pierce the corporate veil in Pennsylvania it must be shown that the “separate [corporate] existence was a mere sham.” Culbreth, 898 F.2d at 14. As discussed above, such domination and control was shown in Ragan where the officers of the company knew little about the day-to-day operations of the company. See Ragan, 62 F.3d at 506-09. This type of control and domination has not been shown here.

Although some of the factors weigh in favor of viewing Dover Downs Entertainment as an alter ego of Dover Downs, Inc. and Dover Downs Speedway, there is no allegation of the corporate structure being used for fraud or injustice. Further, the companies appear to function as is customary in a holding company structure. See Culbreth, 898 F.2d at 18. Certain activities are centralized, when it makes economic sense to do so. Only two of the companies, Dover Downs, Inc. and Dover Downs Speedway, have operations, and therefore, most of the intercompany transactions are between those two companies. It is difficult to see how granting this court jurisdiction

over two companies which have absolutely no contact with this forum would be necessary to avoid injustice. The only articulated reason for doing so is to allow the plaintiffs to sue in this jurisdiction rather than the District of Delaware. Their inability to do so is surely not an “injustice.” Even the two operating companies that have stipulated to personal jurisdiction in this forum only appear to have contact with this forum through their advertising. See Plaintiff's Response at 1. The two corporate entities which are subject to jurisdiction in Pennsylvania are not undercapitalized. The accident out of which this lawsuit arises did not occur in this forum; the plaintiffs have no meaningful present contacts to this forum. Thus, there appears to be no reason why public policy would necessitate disregarding the corporate structure and finding that jurisdiction exists here over all four defendants.

D. TRANSFER TO THE DISTRICT OF DELAWARE

This court does not have jurisdiction over two of the defendants. Defendants requested dismissal of the action, or in the alternative, transfer to the District of Delaware under 28 U.S.C. § 1631. During a telephone conference with counsel, plaintiffs' counsel acknowledged that if there is no jurisdiction over all four defendants, the case should be transferred to the District of Delaware. It would make no sense to dismiss two of the defendants from this action and allow it to proceed against the other two since plaintiffs would then file a separate action in the District of Delaware. I will therefore transfer the entire action to the District of Delaware where there is no issue of jurisdiction, venue or

service.

An appropriate order follows.

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of the Estate of EUGENE C. EVERITT, JR., :  
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DOVER DOWNS ENTERTAINMENT, : NO. 98-6116  
INC., DOVER DOWNS PROPERTIES, :  
INC., DOVER DOWNS INTERNATIONAL :  
SPEEDWAY, INC. and DOVER DOWNS, :  
INC. :

**ORDER**

AND NOW, this        day of June 1999, upon consideration of the defendants' motion to dismiss or in the alternative to transfer to the District of Delaware, plaintiffs' response, defendants' reply and plaintiffs' sur-reply thereto, and after telephone conference with counsel;

1.     The motion to dismiss is DENIED; and,
2.     The motion to transfer to the District of Delaware is GRANTED and it is ORDERED that the plaintiffs' action is TRANSFERRED to the District of Delaware.

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William H. Yohn, Jr., J.