No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

—against—

STATE OF NEW YORK,

Defendant.

MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST THE STATE OF TEXAS

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The State of New York ("New York"), pursuant to Rule 42 of this Court's Rules and Rules 12(c) and 12(h)(2) of the Federal Rules of Civil Procedure, moves for judgment on the pleadings against the State of Texas ("Texas") to dismiss its complaint in intervention for failure to state a claim upon which relief can be granted and states as follows:

1. On May 31, 1988, the Court granted the motion by the State of Delaware ("Delaware") for leave to file a complaint against New York. The complaint alleged that Delaware was entitled to possession of certain unclaimed property held by or formerly held by brokers ("debtor brokers") located in New York and incorporated in Delaware under *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972).

2. New York answered on July 27, 1988.

3. This Court appointed Dean Thomas Jackson as Special Master on December 12, 1989.

4. On February 21, 1989, this Court granted Texas leave to file a complaint in intervention.

THE RULE IN *TEXAS V. NEW JERSEY*

5. This Court, in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), established a clear rule for determining the respective rights of States to unclaimed property. In *Texas v. New Jersey*, the Court concluded that the question of which state is entitled to escheat abandoned unclaimed intangible property "should be settled once and for all by a clear rule which will govern all types of intangible obligations like these and to which all States may refer with confidence." 379 U.S. at 678. The abandoned unclaimed property in that case included "uncashed checks payable to shareholders for dividends on common stock" and "undelivered fractional stock certificates resulting from stock dividends" of Sun Oil Company, incorporated in New Jersey. 379 U.S. at 675 n.4.

6. Four different rules were proposed. Texas urged that "the State with the most significant 'contacts' with the debt should be allowed exclusive jurisdiction to escheat it." 379 U.S. at 678. In particular, it contended that "royalties, rents, and mineral proceeds derived from land located in Texas should be escheatable only by that State." *Id.* at 679 n.9. This Court did not believe that "the fact that an intangible is income from real property with a fixed situs is significant enough to justify treating it as an exception to a general rule concerning escheat of intangibles." *Id.* The Court concluded that the rule Texas advocated, however, would leave the question in "permanent turmoil" and was "not really any workable test at all." *Id.* at 678, 679.

7. New Jersey asserted that the state with power to escheat should simply be the state of the debtor's domicile. *Id.* at 679. Although this rule would have "the obvious virtues of clarity and

ease of application," it was not the only one which did, and it seemed to the Court that "in deciding a question which should be determined primarily on principles of fairness, it would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the state in which the debtor happened to incorporate itself." *Id.* at 680.

8. Pennsylvania argued that the state in which the debtor had its principal offices should be entitled to escheat since that state was "probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence." *Id.* This rule, however, ignored the status of the debts as a liability of the debtor, not an asset, and would involve difficult questions concerning the location of the principal place of business. *Id.* at 680.

9. The Court adopted the rule proposed by Florida. It held that "each item of property in question in this case is subject to escheat only by the State of the last known address of the creditor, as shown by the debtor's books and records." *Texas v. New Jersey*, 379 U.S. at 681-82. When the last known address cannot be determined from the debtor's books and records, "that the property be subject to escheat by the State of [the debtor's] corporate domicile." *Id.* In that situation, however, the state where the debtor is incorporated may "cut off the claims of private persons only, retaining the property for itself only until some other State comes forward with proof that it has a superior right to escheat." *Id.*

10. It gave four reasons for the last known address rule. First, "[a]doption of such a rule involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided." *Id.* at 681. Second, "the rule recognizes that the debt was an asset of the creditor." *Id.* Third, it "will tend to disbribute escheats among the States in the proportion of the commercial activities of their residents." *Id.* Fourth, "by using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified." *Id.*

11. Seven years later in *Pennsylvania v. New York*, the Court was called upon to reconsider the decision in *Texas v. New Jersey* on the ground that New York would receive a windfall if the rule were strictly applied. It flatly refused, holding that "to vary the application of the *Texas* rule . . . would require this Court to do precisely what we said should be avoided—that is, 'to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever developing new categories of facts.' " *Pennsylvania v. New York*, 407 U.S. at 215 (citing *Texas v. New Jersey*, 379 U.S. at 679).

THE FUNDS AT ISSUE IN THIS CASE

12. The abandoned property which Delaware and Texas claim consists mainly of dividend and interest overpayments owed by one broker ("debtor broker") to another broker or bank ("creditor broker"). These overpayments were made by corporate paying agents of securities issuers to debtor brokers, which held the underlying securities in their own name for their customers (the "beneficial owners"). The debtor brokers then sold the securities to creditor brokers before the record date. The creditor brokers purchased the securities for their own customers but did not register the certificates before the record date. The creditor brokers have failed to claim the overpayments when the brokers attempted to reconcile their accounts. The debtor brokers left holding the overpayments owed to the creditor brokers have turned over this abandoned property to New York. *See* New York's brief in opposition to motion for leave to file complaint at 3-4. Texas has sought, in addition to these overpayments, overpayments remitted to New York which are held by the Depository Trust Company, a trust company incorporated in New York, and dividend and interest overpayments attributable to municipal and state bonds. *See* Texas complaint in intervention ("Texas complaint") at 10.

THE CLAIMS ASSERTED BY THE PARTIES IN THIS CASE

13. New York and Delaware have both recognized that the rule in *Texas v. New Jersey* and in *Pennsylvania v. New York*

governs this case. However, they disagree concerning the facts of this case. Delaware contends that the addresses of the creditors cannot be determined from the debtor's books and records and New York argues that the addresses of the creditors can be determined from such records.

14. Texas, on the other hand, seeks to have this Court replace the rule in *Texas v. New Jersey* and *Pennsylvania v. New York* by distorting long-established principles of commercial law regarding debtor-creditor relationships. It contends that this Court should adopt one of three rules, each of which basically asserts that abandoned property should be remitted to the state of incorporation of the issuer, not the state of the creditor's last known address or the state of the debtor. First, it asserts that, "[i]f the identity and location of the Beneficial Owner," who is not a even a creditor, having been paid in the ordinary course of business by the creditor broker, "is unknown, the state of incorporation of the Issuer should be entitled to collect the Excess Receipts under that state's unclaimed property law." Texas complaint at 11. Second, it contends that the Court should adopt the same rule for all abandoned dividends and interest which it applies when a paying agent — an agent of the issuer — cannot find a last-known address for the record owner — a creditor — and remit the abandoned property to the state of incorporation of the issuer. *Id.* at 22-23. Finally, in the prayer for relief, Texas demands "all of the Excess Receipts and Additional Excess Receipts paid or delivered to New York attributable to Issuers incorporated in the State of Texas and Texas Governmental Issuers which have been abandoned for the applicable dormancy period under the Texas Property Code[.]" *Id.* at 39. It defines both "Excess Receipts" and "Additional Excess Receipts" in the complaint so broadly that they encompass property abandoned by creditors with last-known addresses and those without any last-known address. *See id.* at 9-10, 13.

15. Texas contends that its claim "is based on the practical reality of the manner in which securities are traded and distributions are paid, and relies upon a strict interpretation of this Court's holding in *Texas v. New Jersey*, 379 U.S. 674 (1965)." Texas complaint at 11.

TEXAS FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

16. Accepting the allegations in the Texas complaint as true, it fails to state a claim upon which relief may be granted under this Court's rule in *Texas v. New Jersey* and *Pennsylvania v. New York*. Indeed, not only is the claim it asserts inconsistent with both decisions, but this Court expressly rejected similar rationales for the Texas theory in those cases.

17. Rule 12(h)(2) permits the defense of failure to state a claim upon which relief may be granted "to be raised in a motion for judgment on the pleadings pursuant to Rule 12(c)." *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith Incorporated*, 353 F. Supp. 264, 268 (S.D.N.Y. 1972), *aff'd*, 495 F.2d 228 (2d Cir. 1974); *see also Slotnick v. Garfinkle*, 632 F.2d 163, 165 (1st Cir. 1980) (per curiam); *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1038 (6th Cir. 1979); 5 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* ("*Federal Practice and Procedure*") § 1367 at 688-89 (1969). Nevertheless "the standards employed in determining the motion will be the same as if the defense had been raised prior to the closing of the pleadings." *Shapiro*, 353 F. Supp. at 268. The motion "is designed to provide a means of disposing of cases when the material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice." 5 *Federal Practice and Procedure* § 1367 at 685 (footnotes omitted); *Accord* 2A J. Moore, *Moore's Federal Practice* ¶ 12.15 at 12-106 (2d ed. 1987). In resolving the motion, "all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false." 5 *Federal Practice and Procedure* § 1368 at 691.

18. None of the approaches suggested by Texas states a claim upon which relief may be granted under this standard. Each is predicated on the novel and unprecedented theory that it is entitled to a portion of the "Excess Receipts" and "Additional Excess Receipts" since "they constitute a debt of the entity ('Issuer')

initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual ('Beneficial Owner') who has the economic rights to the security, including the entitlement to Distributions." Texas complaint at 10. Thus, it contends, "[i]f the identity and location of the Beneficial Owner is unknown, the state of incorporation of the Issuer should be entitled to collect the Excess Receipts under that state's unclaimed property law." *Id.* at 11. Even assuming that the identity and address of the beneficial owner is unknown, the beneficial owner is not a creditor of the issuer concerning the unclaimed dividends nor is the issuer a debtor.

19. The issuer is a debtor only to the shareholder of record — here, the debtor broker — and only between the record date and the payable date. It is a fundamental principle of corporate law that "[d]eclaration of a dividend sets up a debtor-creditor relationship between the corporation and its shareholders. It creates a debt for which, if unpaid, the shareholder may sue in an action at law." G. Hornstein, 1 *Corporation Law and Practice* § 472 at 594 (1959) ("*Corporation Law and Practice*") (footnotes omitted). *See also McLaren v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 46, 93 S.W. 819, 821 (1906) (and cases cited); *Searles v. Gebbie*, 115 A.D. 778, 780, 101 N.Y.S. 199, 201 (4th Dep't 1906). Thus, a corporation is liable for the payment of dividends and interest only to the shareholder of record until it receives notification of a transfer. *Homestake Oil Co. v. Rigler*, 39 F.2d 40, 41 (9th Cir. 1930) ("the corporation is protected in paying dividends to the record owner until notified of assignment and right to collect the dividends."); *Munro v. Mullen*, 100 N.H. 128, 121 A.2d 312 (1956) (holder of stock on record date entitled to the dividend); *Davis v. Fraser*, 307 N.Y. 433, 121 N.E.2d 406 (1954) (a corporation cannot be held liable at the instance of the actual owner if, in good faith, it paid the dividends to the record owner); *Barbato v. Breeze Corp.*, 128 N.J.L. 309, 26 A.2d 53 (1942) (same); *Greasy Brush Coal Co. v. Hays*, 292 Ky. 517, 166 S.W.2d 983 (1942) (same); 11 *Fletcher Cyclopedia of the Law of Private Corporations* § 5377 at 915 (Rev. ed. L. Zajdel ed. 1986) ("*Fletcher*") (footnote omitted); G. Hornstein, 1 *Corporation Law and Practice* § 472 at 593-94. The rule is the same

under the Commercial Code. U.C.C. § 8-207(1) (Supp. 1989) ("Prior to due presentment for registration of transfer of a certificated security in registered form, the issuer . . . may treat the registered owner as the person *exclusively entitled* to vote, to receive notifications, and otherwise *to exercise all the rights and powers of an owner.*") (emphasis supplied).

20. The beneficial owner is not a shareholder of record and thus has no right to dividends against the corporate issuer; this is a right only belonging to the shareholder since "stock dividends are an incident of ownership of stock," 11 *Fletcher* § 5083 at 24-25 (footnote omitted). A share of stock is "the interest or right which the owner, who is called the 'shareholder,' has in the management of the corporation, and in its surplus profits." *Id.* § 5083 at 24 (footnote omitted). Whatever right a beneficial owner may have to dividends, therefore, lies solely against the beneficial owner's broker.

21. The allegations of the Texas complaint demonstrate that the issuers here have satisfied their debt to the shareholders. Texas states that it seeks dividends and interest which the issuers have paid to the record owners (here, debtor brokers). It defines the "Excess Receipts" it seeks as

> unclaimed *payments* of dividends, profits, principal, interest, and securities representing any of the foregoing ("Distributions") held or formerly held by the brokerage firms incorporated in the State of Delaware. The Excess Receipts are Distributions *received* by these brokerage firms for the benefit of their customers which exceed the amounts to which the brokerage firms are entitled.

Texas complaint at 9-10 (emphasis supplied). It states that "Additional Excess Receipts are of the same character and come into existence in the exact same manner as the Excess Receipts at issue in the principal case." *Id.* at 10. Since the issuer has, by definition, satisfied the obligation to pay dividends and interest to the record owner (here, the debtor broker), the assertion by Texas that the issuer is a "debtor" which owes a "debt" to the

beneficial owner is without merit. It necessarily follows that the theory that the issuer is a "debtor" fails to state a claim upon which relief may be granted.

22. Similarly deficient is the Texas claim that the Court should adopt the same rule for all abandoned dividends and interest it applies when a paying agent — an agent of the issuer — cannot find a last known address for the record owner — a creditor — and remit the abandoned property to the state of incorporation of the issuer. *Id.* at 22-23. In that case, the paying agent, as an agent of the issuer, is viewed as having the same address as its principal and the issuer is still a debtor which has not satisfied its debt to the creditor record holder. Thus, under *Texas v. New Jersey*, the state of the issuer's incorporation would be entitled to escheat (because the address of the creditor or record holder could not be determined). That, of course, is not the case here where the issuer has satisfied the record holder (here, the debtor broker). Therefore, this theory also fails to state a claim upon which relief may be granted.

23. Finally, the prayer for relief demanding "*all* of the Excess Receipts and Additional Excess Receipts paid or delivered to New York attributable to Issuers incorporated in the State of Texas and Texas Governmental Issuers which have been abandoned for the applicable dormancy period under the Texas Property Code[,]" Texas complaint at 39 (emphasis supplied), fails to state a claim cognizable under *Texas v. New Jersey*. Texas defines both "Excess Receipts" and "Additional Excess Receipts" so broadly that they include property abandoned by creditors with last-known addresses and those without any last-known address. *See* Texas complaint at 9-10, 13. Since the rule in *Texas v. New Jersey* expressly provides that the state of the creditor's last-known address is entitled to escheat, this theory as well fails to state a claim.

CONCLUSION

For all the foregoing reasons, this Court should grant New York judgment on the pleadings dismissing the Texas complaint.

Dated: New York, New York
May 26, 1989

Respectfully submitted,

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