UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7080

MOTOROLA COMMUNICATIONS AND ELECTRONICS, INC.,

Plaintiff-Appellant,

versus

THE SHAREHOLDERS OF LOWERY COMMUNICATIONS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(CA H 89 4544)

(March 19, 1993)

Before POLITZ, Chief Judge, GARWOOD and DAVIS, Circuit Judges.

POLITZ, Chief Judge:[*]

Motorola Communications and Electronics, Inc. appeals dismissal of its suit to collect a corporate debt from the former shareholders of now-defunct Lowery Communications, Inc. Lacking subject matter jurisdiction, we affirm the dismissal.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Motorola sold a significant quantity of electronic equipment to a wholly-owned subsidiary of Lowery Communications, Inc. When payments fell into arrears Motorola secured the commitment of LCI and its majority stockholder, Wayne Lowery, to assume and guarantee payment, respectively. Payments again became delinquent and LCI filed for dissolution. Upon dissolution, six of the eight minority stockholders each received $30,000 in cash and the other two received stock in Lowery's newly-formed WDS Communications, Inc. WDS assumed LCI's liabilities but it made no payment on the Motorola debt. In due course Motorola sued and obtained judgment against Lowery, LCI, and WDS for the $140,000 balance due on the debt. The judgment proved a hollow victory, for WDS and Lowery both filed for bankruptcy. Motorola then vectored in on LCI's minority stockholders and filed the instant complaint.

Defendants unsuccessfully sought dismissal for lack of subject matter jurisdiction but the court dismissed the complaint in midtrial on grounds that it was time-barred. Motorola timely appealed. Concluding that the federal courts lack subject matter jurisdiction over this complaint, we affirm the dismissal, but for lack of such jurisdiction. Having so concluded we do not reach the limitations issue.

Analysis

Motorola invokes diversity jurisdiction under 28 U.S.C. § 1332. That statute requires that the amount in controversy

exceed "the sum or value of $50,000, exclusive of interest and costs." Only claims asserted against defendants meeting this jurisdictional threshold pass muster unless the several claims can be aggregated.[1] Our decision that we lack jurisdiction is based on the finding that the claims separately do not satisfy the *ad damnum* requirement and, further, on our conclusion that the claims cannot properly be aggregated.

To hold the minority stockholders liable for LCI's debt Motorola would apply the corporate trust fund doctrine, codified in Article 7.12 of the Texas Business Corporation Act.[2] The trust fund doctrine essentially burdens corporate assets received by shareholders at dissolution with an equitable lien to secure predissolution claims.[3] As we have recognized,[4] this constitutes only *in rem* liability. Even if a shareholder's *in rem* liability were deemed personal liability under certain circumstances, that personal liability could not exceed the value of the assets

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[1] 14A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d, § 3704 at 75-80 (1985 and 1992 Supp.).

[2] **Hunter v. Fort Worth Capital Corp.**, 620 S.W.2d 547 (Tex. 1981). Article 7.12 has been amended since suit was filed.

[3] **North American Savings Ass'n v. Metroplex Development Partnership**, 931 F.2d 1073 (5th Cir. 1991); Norton, Relationship of Shareholders to Corporate Creditors upon Dissolution: Nature and Implications of the "Trust Fund" Doctrine of Corporate Assets, 30 Bus. Law 1061 (1975).

[4] **Metroplex**.

received.[5] It is undisputed that six of the minority shareholders each received distributions of $30,000 and that the other two received stock in a company that was in bankruptcy at the time that this suit was filed and hence was virtually worthless. Accordingly, none of the several claims satisfies the jurisdictional minimum.

Motorola counters that its claims against the individual shareholders should be aggregated because in substance it seeks to recover a single $140,000 debt, or more accurately, a single judgment rendered against LCI and Lowery on that debt. Claims against multiple defendants "can be aggregated for the purpose of attaining the jurisdictional amount, as a general proposition, if they are jointly liable to the plaintiff."[6] This misperceives the essence of this suit which in reality is an action to enforce liens against the corporate assets distributed to each shareholder. As such, Motorola's claims against the defendants are separate and distinct and are not subject to aggregation.

Alternatively, Motorola maintains that the shareholders are jointly and severally liable for the entire debt under the theory of "denuding the corporation" as espoused in **World Broadcasting**

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[5] **Metroplex**; **Henry I. Siegel Co., Inc. v. Holliday**, 663 S.W.2d 824 (Tex. 1984).

[6] **Jewell v. Grain Dealers Mutual Ins. Co.**, 290 F.2d 11, 13 (5th Cir. 1961).

System, Inc. v. Bass[7] and **Fagan v. LaGloria Oil & Gas Co.**[8] As the Texas Supreme Court explained in **World Broadcasting**, however:

> The law which sends a corporation into the world with the capacity to act imposes upon its assets liability for its acts. The corporation cannot disable itself from responding by distributing its property among its stockholders, and leaving remediless those having valid claims. In such a case the claims, after being reduced to judgments, may be satisfied out of the assets in the hands of the stockholders . . . .[9]

We read this language, and the opinion as a whole, as limiting individual shareholder liability in a typical dissolution to the value of the assets received by the shareholder in the dissolution. Motorola would have us accept **Fagan** as authority for the proposition that **World Broadcasting** established a theory of joint and several liabilitly. We are not persuaded. As an **Erie**[10] court we are to be guided by the Texas Supreme Court's interpretation of Texas law.[11] Following that guidon, we conclude that joint and several liability is not applicable to the facts at bar.

Further, we find **Fagan** inapposite, for there the shareholders

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[7] 328 S.W.2d 863 (Tex. 1959).

[8] 494 S.W.2d 624 (Tex.Civ.App. 1973, no writ).

[9] **World Broadcasting**, 328 S.W.2d at 864, quoting **Pierce v. United States**, 255 U.S. 398, 402, 41 S.Ct. 365, 65 L.Ed. 697, 702 (1921).

[10] **Erie R. Co. v. Tompkins**, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

[11] **Lawrence v. Virginia Ins. Reciprocal**, 979 F.2d 1053 (5th Cir. 1992).

deliberately manipulated the assets of the corporation to put them beyond the reach of the plaintiff-creditor. Other "denuding the corporation" cases involved similarly *malum animus*.[12] In the case at bar, Motorola specified no factual basis for a parallel allegation, despite its opportunity to respond to defendants' motion to dismiss.[13] Joint and several liability does not lie herein.

Finally, Motorola urges that the inclusion of attorney's fees would bring the potential recovery from each defendant above the mandated minimum. We recognize that reasonable attorney's fees can be included in calculating the amount in controversy if provided for by contract or law.[14] Assuming without deciding that such fees would be assessable herein, we nonetheless must reject this argument. When jurisdiction was challenged Motorola offered no suggestion of reasonable fees in this cause. The first suggestion

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[12] See **Pierce**, supra; **Francis v. Beaudry**, 733 S.W.2d 331 (Tex.App. 1987, writ ref'd n.r.e); **Inesco, Inc. v. Sears**, 567 S.W.2d 827 (Tex.Civ.App. 1978, writ ref'd n.r.e.); **Burton Mill & Cabinet Works, Inc. v. Truemper**, 422 S.W.2d 825 (Tex.Civ.App. 1967, writ ref'd n.r.e). **Francis** and **Inesco** both imposed joint and several liability; the defendants in each, however, were held liable under the alter ego theory. In neither case were the defendants minority shareholders, as is here presented.

[13] See **Diefenthal v. C.A.B.**, 681 F.2d 1039, 1052 (5th Cir. 1982) (when jurisdiction is challenged, plaintiff must specify the factual basis of his claims. "Jurisdiction is not conferred by the stroke of a lawyer's pen. When challenged, it must be adequately founded in fact."), cert. denied, 459 U.S. 1107 (1983).

[14] **Foret v. Southern Farm Bureau Life Ins. Co.**, 918 F.2d 534 (5th Cir. 1990).

for including attorney's fees came on appeal. We have no factual basis in the record for making that calculation.[15]

The judgment of the district court dismissing the complaint is therefore AFFIRMED.

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[15] **Diefenthal**, supra; **Dep't of Recreation and Sports of Puerto Rico v. World Boxing Ass'n**, 942 F.2d 84 (1st Cir. 1991); **Sarnoff v. American Home Products Corp.**, 798 F.2d 1075 (7th Cir. 1986).

To reach the $50,000 threshold Motorola would have to prove the propriety of over $20,000 in attorney's fees for each of the six defendants who received a $30,000 distribution and nearly $50,000 for the two defendants who received the near worthless WDS stock. The fees thus would total more than one and one-half times the amount of Motorola's judgment.