IN THE SUPREME COURT OF THE STATE OF DELAWARE

WAVEDIVISION HOLDINGS, LLC and MICHIGAN BROADBAND, LLC,	§	
	§	No. 649, 2011
Plaintiffs Below-Appellants,	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	C.A. No. 08C-11-132
HIGHLAND CAPITAL MANAGEMENT, L.P., TRIMARAN CAPITAL PARTNERS, L.P., HIGHLAND FLOATING RATE ADVANTAGE FUND, a Delaware statutory trust; HIGHLAND CRUSADER FUND GP, L.P., a Delaware limited partnership; and PIONEER FLOATING RATE TRUST, a Delaware statutory trust,	§	
Defendants Below-Appellees .	§	

Submitted: May 16, 2012
Decided: July 19, 2012

Before **STEELE**, Chief Justice, **HOLLAND**, **BERGER**, **JACOBS**, and **RIDGELY**, Justices, constituting the Court *en Banc*.

Upon appeal from the Superior Court. **AFFIRMED**.

Gary F. Traynor, Esquire, and Tayna E. Pino, Esquire, of Pricket, Jones & Elliot, P.A., of Wilmington, Delaware; Of Counsel: Don Paul Badgley, Esquire, and Randall Johnson, Esquire (argued), of Badgley-Mullins Law Group, of Seattle, Washington, for Appellants;

Daniel K. Hogan, Esquire, of The Hogan Firm, of Wilmington, Delaware; Of Counsel: Paul B. Lackey, Esquire (argued), and Michael P. Aigen, Esquire, of Lackey Hershman LLP, of Dallas, Texas, for Appellees Highland Capital Management, L.P., Highland Crusader Offshore Partners, L.P., and Highland Crusader Fund GP L.P.;

Stephen B. Brauerman, Esquire, and Justin R. Alberto, Esquire, of Bayard, P.A., of Wilmington, Delaware; Of Counsel: Arthur H. Ruegger, Esquire (argued), of SNR Denton US LLP, of New York, New York, for Appellee Trimaran Capital Partners, LLC;

Michael F. Bonkowski (argued), Esquire, of Cole Schotz Meisel Forman & Leonard, P.A., of Wilmington, Delaware, for Appellee Highland Floating Rate Advantage Fund;

Kenneth J., Nachbar, Esquire and Karl G. Randall, Esquire, of Morris, Nichols, Arsht & Tunnell LLP, of Wilmington, Delaware; Of Counsel: Frances S. Cohen, Esquire (argued), of Bingham McCutchen LLP of Boston, Massachusetts, for Appellee Pioneer Floating Rate Trust.

RIDGELY, Justice:

Plaintiffs-Below/Appellants WaveDivision Holdings, LLC and Michigan Broadband, LLC (collectively, "Wave") entered into two exclusive agreements with third-party Millennium Digital Media Systems, LLC ("Millennium") to purchase cable television systems from Millennium. Millennium terminated the agreements and instead pursued a refinancing with its note holders and senior lenders. In a separate proceeding, the Court of Chancery found Millennium liable to Wave for breach of contract and awarded Wave $14,872,000 in damages.[1]

Wave also brought an action in the Superior Court against Millennium's note holders and senior lenders, Defendants-Below/Appellees Highland Capital Management L.P., ("Highland Capital"), Highland Crusader Funds ("Highland Crusader"), Highland Floating Rate Fund ("Highland Floating Rate"), Trimaran Capital Partners, L.P. ("Trimaran"), and Pioneer Floating Rate Trust ("Pioneer"), *et al.* (collectively, "Appellees"). Wave sought damages against Appellees, contending, *inter alia*, that the Appellees tortiously interfered with the Wave-Millennium contract. The Superior Court granted summary judgment to Appellees on this claim, concluding that any interference was justified under Delaware law and that Appellee Pioneer did not have actual or imputed knowledge of the underlying contract. For the reasons that follow, we agree and affirm.

[1] *See WaveDivision Holdings, LLC v. Millennium Digital Media Systems, LLC,* 2010 WL 3706624, at *24 (Del. Ch. Sept. 17, 2010).

Facts and Procedural History[2]

Wave is a Washington-based provider of broadband cable services. Millennium, a Delaware entity, owned and operated cable systems in Michigan, Maryland, and the Northwest.

During the late 1990s, Millennium obtained financing by selling $70 million of unsecured high-yield senior increasing rate notes (the "IRNs"). The holders of the IRNs (the "IRN Holders") included investment funds held or managed by Trimaran and Highland Capital. In particular, Highland Capital controlled, owned and/or managed funds of Highland Crusader, Highland Floating Rate, and Pioneer, all of whom became IRN Holders. The IRN Agreement gave the IRN Holders certain rights relating to the disposition of Millennium's assets and access to Millennium's company information.

Millennium also extended credit to first-tier senior secured creditors (the "Senior Lenders") under a First Amended and Restated Credit Agreement (the "Credit Agreement"), which Millennium entered into on December 29, 2000. The Credit Agreement gave the Senior Lenders a first priority lien on substantially all of Millennium's assets. The Senior Lenders had priority over the IRN Holders. Like the IRN Agreement, the Credit Agreement gave the Senior Lenders disclosure

[2] The factual history is taken from the fact section of the opinion below. *See WaveDivision Holdings, LLC v. Highland Capital Management L.P., et al.,* 2011 WL 5314507 (Del. Super. Nov. 2, 2011).

and consent rights. Section 7.03(c) of the Credit Agreement provided in relevant part:

> [N]either [Millennium] nor any Subsidiary will, directly or indirectly . . . .
>
> Section 7.03. [S]ell, lease, transfer or otherwise dispose of its properties, assets . . . to any Person . . . and except as follows:
>
> ***
>
> Dispositions of additional assets outside the ordinary course of business with the prior written consent of the Required Lenders, in their sole and absolute discretion, which consent, if given, shall in any event be contingent upon the threshold conditions set forth in clauses (i), (ii), (iii), and (iv) of Section 7.03(b) above.

Funds managed by Highland Capital began purchasing Millennium's senior debt in February 2005.

In the mid-2000s, Millennium faced growing financial problems. To avoid default, Millennium sought covenant relief from the Senior Lenders. The parties executed a Fifth Amendment to the Senior Secured Agreement on May 31, 2005 (the "Fifth Amendment"). The Fifth Amendment required Millennium to sell all or substantially all of its assets to repay the Senior Lenders.

Millennium engaged Daniels & Associates to market its assets for sale. Wave submitted an offer to purchase the Michigan and Northwest cable systems from Millennium for $157 million. On December 19, 2005, Wave and Millennium signed a Letter of Intent for the purchase and sale of those systems. The Letter of

Intent contained an exclusivity clause providing that Millennium would not "offer, seek to offer, or entertain or discuss any offer, to sell, directly or indirectly, the Systems."

On January 5, 2006, Millennium made a presentation to the IRN Holders about Millennium's financial status and recommended that the Wave-Millennium deal be approved. The IRN Holders stated that they believed the price was inadequate. Trimaran and Highland Capital, both IRN Holders, suggested that Millennium make a presentation about the IRN Holders' potential return on their investment if they provided a capital infusion.

Despite the IRN Holders' negative reaction to the proposed Wave-Millennium deal, Millennium's Management Committee continued to pursue it. One month after the presentation, Millennium and Wave entered into an Asset Purchase Agreement (the "APA") for the Michigan system and a Unit Purchase Agreement (the "UPA") for the Northwest System.[3] Both Agreements required the consent of the IRN Holders and the Senior Lenders, unless Wave and Millennium reasonably believed that such consent was not necessary. The Agreements required Millennium to use commercially reasonable efforts to obtain the required approvals and prohibited Millennium from, *inter alia*, initiating or engaging in any discussions for purposes of making any proposal, "that may reasonably be

[3] The UPA, collectively with the APA, are referred to as the "Agreements."

expected to lead to, any effort or attempt by any other Person to seek or effect the acquisition of the Business, any ownership interests in the LLC, any of the Systems, or the Transferred Assets."

The IRN Holders engaged a consulting firm, Barrier Advisors ("Barrier"), to prepare a recommendation as to: (1) whether or not the IRN Holders should consent to the Agreements; and (2) potential alternatives to the Agreements. Barrier concluded that the IRN Holders would not recover their investment if the Agreements closed. Barrier then considered the potential return for the IRN Holders if instead they provided Millennium with a capital infusion to upgrade the systems.

Around the time that Barrier was retained, Highland Capital purchased additional senior debt, in order to protect its stake in Millennium. Highland Financial Corporation, not a defendant in the action below, submitted a refinancing proposal to Millennium on March 8, 2006. The proposal called for a full debt-for-equity swap of the IRNs and was contingent upon termination of the Agreements. One month later, Highland Capital and Trimaran informed Millennium that they would not consent to the Agreements in their capacity as IRN Holders.

On April 19, 2006, Wave informed Millennium that it had reviewed the IRN Agreement and had concluded that the IRN Holders' consent to the APA and UPA was not required. Wave informed Millennium that, "Pursuant to Section 6.3(c)(iii)

of the [IRN Agreement], [Wave] therefore deem[s] consent of the IRN holders to be obtained." On April 21, Highland Capital sent a letter to Wave on behalf of seven Senior Lenders, including Highland Floating Rate and Pioneer (the "April 21 Letter"). In the April 21 Letter, Highland Capital informed Millennium that the undersigned Senior Lenders did not consent to the APA and UPA, stating:

> Please be advised that the undersigned Lenders do not consent to the Proposed Dispositions.
>
> * * *
>
> The undersigned Lenders currently hold more than 50% of the sum of the aggregate outstanding principal amount of the Loans, and therefore, without the consent of the undersigned Lenders, the Proposed Dispositions remain prohibited by 7.03(c) of the Credit Agreement.

In the proceedings below, Pioneer argued that it had no knowledge of the APA and UPA, or the April 21 Letter.

On July 28, 2006, Millennium notified Wave of its decision to terminate the Agreements. That same day, Millennium accepted the refinancing proposal from Highland Capital, Trimaran and the other IRN Holders, pursuant to which the IRN Holders' interests were converted into equity interests. Trimaran thus became the largest equity holder. Highland Capital also became the largest Senior (secured) Lender and an equity owner of Millennium.

Wave brought suit against certain creditors of Millennium, including Appellees, seeking damages for tortious interference. The Superior Court granted

summary judgment in favor of Highland Capital, Trimaran, Highland Floating Rate, and Highland Crusader on the ground that their actions were justified because they were protecting their existing investments in Millennium. The Superior Court granted summary judgment in favor of Pioneer on the grounds that: (i) Pioneer lacked knowledge of the underlying contract—a required element for tortious interference—and (ii) Highland Capital's knowledge could not be imputed to Pioneer because Highland Capital was acting as an independent contractor. This appeal followed.

Analysis

We review the Superior Court's grant of summary judgment *de novo* "to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[4]

The Superior Court Correctly Applied the Law in Determining that Interference Was Justified

Wave contends that the Superior Court erred in determining that any interference was justified. Wave argues that the Superior Court ignored evidence in the record of improper conduct, which raised at least a triable issue of fact on the tortious interference claim.

[4] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.,* 36 A.3d 776, 779 (Del. Jan 03, 2012) (quotations omitted).

Delaware courts follow Section 766 of the Restatement (Second) of Torts in assessing a tortious interference claim.[5] To prevail, Wave must show that: "(1) there was a contract, (2) about which the particular defendant knew, (3) an intentional act that was a significant factor in causing the breach of contract, (4) the act was without justification, and (5) it caused injury."[6] Section 767 of the Restatement cites the following factors to consider in determining if intentional interference with another's contract is improper or without justification:

> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.[7]

On appeal, Wave argues that courts must evaluate any improper motive together with any proper motive, to determine which motive predominates for purposes of Section 767(b). We conclude this argument lacks merit. The defense

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[5] *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749, 751 (Del. 2010); *Hursey Porter & Assoc. v. Bounds*, 1994 WL 762670, at *13 (Del. Super. Dec. 2, 1994).
[6] *Irwin & Leighton, Inc. v. W&M Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987); Restatement (Second) of Torts, § 766 (1979).
[7] Restatement (Second) of Torts § 767 (1979).

of justification does not require that the defendant's proper motive be its sole or even its predominate motive for interfering with the contract. Only if the defendant's *sole* motive was to interfere with the contract will this factor support a finding of improper interference.[8]

Here, the Superior Court recognized that the IRN Holders and Senior Lenders were motivated at least in part by a desire to protect their investment in Millennium, and not solely by a desire to interfere with a Wave-Millennium deal. Thus, the Superior Court properly concluded that the motive factor weighed in favor of justification.

Wave next contends that, even if the Appellees did not have an improper motive, they used improper means to interfere with the Wave-Millennium deal. In particular, Wave argues that Highland Capital made false representations in the April 21 Letter when it stated that it represented the interests of 51% of the Senior Lenders and that those Senior Lenders did not consent to the Agreements. Wave also argues that the Appellees improperly used inside information and exerted economic pressure.

A fraudulent misrepresentation is ordinarily an improper means of interference and precludes a defense of justification.[9] "A representation is

[8] *See Hursey Porter*, 1994 WL 762670, at *13; Restatement (Second) of Torts § 767 cmt. d (1979).
[9] Restatement (Second) of Torts § 767, cmt. b–c.

fraudulent when, to the knowledge or belief of its utterer, it is false in the sense in which it is intended to be understood by its recipient."[10] Here, however, Wave produced no evidence that Highland Capital made the representations in the April 21 Letter with fraudulent intent. To the contrary, the record showed that Highland Capital bought 51% of the senior debt, could assign that acquired debt to any entity that it chose, and believed that it (Highland Capital) could refuse to give its consent. Moreover, Wave and Millennium had the burden to obtain the consents required by the APA and UPA. There was no evidence that the Senior Lenders or the IRN Holders actually consented. At most, Highland Capital's letter reflects that those consents had not yet been obtained. Wave has not demonstrated the existence of a disputed issue of material fact as to the Appellees' use of improper means. Wave's arguments regarding the use of inside information and economic pressure also lack adequate support in the record.

The Superior Court concluded that four of the seven Restatement factors—the nature of the actor's conduct; the actor's motive; the interests sought to be advanced by the actor; and the relations between the parties—weighed against a finding of improper interference. We find no error in the Superior Court's analysis or its reliance on the rationale of *Hursey Porter*. Wave has failed to show as a

[10] *Id.* at § 767 cmt. c.

matter of law that the Appellees interfered with the Wave-Millennium contract without justification.

The Superior Court Did Not Resolve Material Issues of Fact in Resolving the Justification Issue

Wave argues that the Superior Court improperly resolved factual disputes and ignored evidence that supported Wave's factual contentions with respect to four issues: (1) the reason for the IRN Holders' interference; (2) the reasons for retaining Barrier; (3) Barrier's conclusions; and (4) Highland Capital's acquisition of the senior notes.

In evaluating a summary judgment record, the Superior Court must not weigh the evidence or resolve conflicts presented by discovery.[11] The Superior Court must "examine the factual record and make reasonable inferences therefrom in the light most favorable to the nonmoving party to determine if there is any dispute of material fact."[12] Factual disputes that are immaterial as a matter of law will not preclude summary judgment.[13]

Wave has not demonstrated to us that the Superior Court improperly weighed the evidence or resolved material, disputed issues of fact in granting summary judgment. As for the reason for the IRN Holders' interference, the record supports the Superior Court's determination that a motive of the IRN

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[11] *AeroGlobal Capital Management LLC v. Cirrus Industries, Inc*., 871 A.2d 428, 444 (Del. 2005).
[12] *Id.*
[13] *See State Farm Mut. Auto. Ins. Co. v. Mundorf*, 659 A.2d 215, 217 (Del. 1995).

Holders was to protect their investment in Millennium. Even if we accept as true Wave's contention that the IRN Holders also had an improper motive, Wave cannot prevail on that basis as a matter of law. For similar reasons, Wave has not shown that the Superior Court resolved a material issue of fact with respect to the retention of Barrier. Even if the IRN Holders retained Barrier in part to explore potential alternatives to the Agreements, the record also demonstrates that the IRN Holders retained Barrier to advise them about whether to consent to the Agreements. Deposition testimony indicated that Barrier was retained for this purpose, and Barrier's presentation contains an evaluation of the Agreements. The existence of some proper motive for retaining Barrier supports the Superior Court's judgment.

Wave also contends that the Superior Court resolved disputed issues of fact when it found that "Barrier concluded that the IRN holders would not recover their investment if the Agreements closed." Even if the Superior Court had resolved an issue of fact with respect to this finding, the issue was not material to its conclusion that the IRN Holders' actions were justified as a matter of law. It is undisputed that, if the Agreements closed, the IRN Holders and the Senior Lenders could not have been paid in full from the sale itself. Finally, as to Wave's argument that the Superior Court mistakenly linked Highland Capital's acquisition of senior debt to an effort to protect its stake in Millennium, Wave has not shown

how any factual finding on this issue was material to the justification determination.

The Superior Court Did Not Err in its Determination of the Consent Rights Issues

Wave contends that the Superior Court made two additional factual findings that were not supported by the record: (1) the IRN Holders had a contractual right to block the Millennium-Wave deal by withholding consent; and (2) "[t]he senior secured lenders would not consent to the Agreements . . . , because the IRN Holders refused to consent."

Wave's first claim is inconsistent with the plain language of the Agreements and the testimony of Millennium's representative on the Management Committee, Kelvin Westbrook. The Agreements unambiguously provided that consummation of the Sale was conditioned upon consent of the Senior Lenders and IRN Holders, unless "[Millennium] and [Wave] reasonably conclude that such consent is not required." According to Westbrook, Millennium believed at all relevant stages that the Senior Lenders' and IRN Holders' consent was required. Thus, even if Wave could demonstrate that the IRN Holders' consent was not actually required under the IRN Agreement, that showing would be immaterial.

As for the second finding challenged by Wave, the Superior Court held that Wave could not show that the Appellees acted without justification based on its analysis of the Section 767 factors as a whole, and not based solely on the consent

rights. Moreover, Westbrook testified that the Senior Lenders consistently took the position that they would not consent before they knew the position of the IRN Holders. Even if the Superior Court's finding had not been supported by the record, the reason why the Senior Lenders did not consent is immaterial. All that is material is that the Senior Lenders had no affirmative duty to provide consent under the Agreements, and they did not provide such consent.

The Superior Court Did Not Resolve Issues of Fact in Determining that Highland Capital Was Not Pioneer's Agent

To prevail on a claim for tortious interference against Pioneer, Wave must establish that Pioneer had actual or imputed knowledge of the underlying contract that was breached.[14] The Superior Court found nothing in the record to show that Pioneer had actual knowledge of the APA and UPA. The Superior Court also concluded that Highland Capital's knowledge could not be imputed to Pioneer because Highland Capital was acting as Pioneer's independent contractor, and not as its agent.[15] On appeal, Wave contends that the Superior Court's agency determination was not supported by the facts or the law.

"The determination of whether an agency relationship exists is normally a question of fact."[16] The relevant factors to consider include "the extent of control,

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[14] Restatement (Second) of Torts § 766 cmt. i (1979); *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 993 (Del. Ch. 1987).
[15] *Id.*; *see also* Restatement (Second) of Agency § 219 (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.").
[16] *Fisher v. Townsends*, *Inc.*, 695 A.2d 53, 61 (Del. 1997).

which, by the agreement, the master may exercise over the details of the work;" "whether or not the one employed is engaged in a distinct occupation or business;" and "whether or not the parties believe they are creating the relation of master and servant"[17]

The Sub-Advisory Agreement between Highland Capital and Pioneer expressly stated that Highland Capital was an independent contractor:

> Independent Contractor. In the performance of its duties hereunder, *the Sub-Adviser is and shall be an independent contractor* and, unless otherwise expressly provided herein or otherwise authorized in writing, *shall have no authority to act for or represent the Fund or the Adviser in any way or otherwise be deemed to be an agent of the Fund or the Adviser*.[18]

Although the "label" that the parties ascribe to their relationship is not controlling,[19] "whether or not the parties believe they are creating the relation of master and servant" is one of the relevant factors under the Restatement for determining whether an agency relationship exists.[20]

To demonstrate that Pioneer could control Highland Capital's activities, Wave points to a single provision in the Sub-Advisory Agreement providing for Pioneer's right to control "the overall management" of the assets:

> No reference in this Agreement to the Sub-Adviser having full discretionary authority over the Fund's investments shall in any

[17] *Id.* at 59 (citing Restatement (Second) of Agency § 220 (1958)).
[18] Emphasis added.
[19] *Fisher*, 695 A.2d at 60.
[20] Restatement (Second) of Agency § 220 (1958).

> way limit the right of the Adviser, in its sole discretion, to establish or revise policies in connection with the management of the Fund's assets or to otherwise exercise its right to control the overall management of this Fund's assets.

That provision, without more, does not create a material issue of fact regarding the existence of an agency relationship. Here, no factfinder could reasonably conclude, based on the evidence presented, that Highland Capital was acting as Pioneer's agent. Wave's final claim on appeal also lacks merit.

Conclusion

The judgment of the Superior Court is AFFIRMED.