

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 20th day of July, 2017.

World Telecom Exchange Communications, LLC, et al., Appellants,

against Record No. 160666
Circuit Court Nos. CL-2012-15054
and CL-2014-09553

Yacoub Sidya, Appellee.

Yacoub Sidya, Appellant,

against Record No. 160672
Circuit Court Nos. CL-2012-15054
and CL-2014-09553

Tulynet FZ, LLC, et al., Appellees.

Yacoub Sidya Appellant,

against Record No. 160895
Circuit Court Nos. CL-2012-15054
and CL-2014-09553

Tulynet FZ, LLC, et al., Appellees.

Upon appeals from a judgment rendered by the Circuit Court of Fairfax County.

Following a jury trial, the trial court entered a partial final judgment against Yacoub Sidya in favor of Tulynet FZ, LLC and World Telecom Xchange Carrier FZ, LLC¹ in the amount

¹ These are two names for the same entity. The case caption in the final order names two plaintiffs: “Tulynet FZ, LLC” and “World Telecom Xchange Carrier, FZ, LLC,” J.A. at 822 (capitalization omitted), the present and former names for the parent company, respectively. The decretal line of the final order also identifies “Tulynet FZ, LLC and World Telecom Xchange Carrier, FZ, LLC” as the plaintiffs receiving the judgment. *Id.* at 823 (capitalization omitted).

of \$2.35 million. *See* J.A. at 822-23, 849-51, 871-73. Because the record demonstrates that TulyNET FZ, LLC did not obtain either a certificate of authority or a certificate of registration from the State Corporation Commission (“SCC certificate”) prior to the entry of the judgment, and that it needed to do so, *see* Code §§ 13.1-758(A), 13.1-1057(A), we vacate the judgment and remand the case for further proceedings.

I.

TulyNET FZ, LLC, f/k/a World Telecom Xchange Carrier FZ, LLC (“TulyNET”) and World Telecom Exchange Communications, LLC (“WTXC”) filed two cases against twelve total defendants in the Circuit Court of Fairfax County, one of which named Sidya as a defendant. The trial court consolidated the cases, entered nonsuits or dismissals as to several defendants, stayed the actions against several other defendants who filed suggestions in bankruptcy, and set the matter for trial against Sidya as the sole defendant.

On the morning of trial, Sidya moved to dismiss TulyNET’s claims because it was transacting business in Virginia without having obtained an SCC certificate. *See* J.A. at 134a. By statute, a foreign limited liability company transacting business in Virginia “may not maintain any action, suit, or proceeding in any court of the Commonwealth until it has registered in the Commonwealth,” Code § 13.1-1057(A), and a foreign corporation transacting business in Virginia “may not maintain a proceeding in any court in the Commonwealth until it obtains a certificate of authority,” Code § 13.1-758(A). The trial court proceeded with the jury trial while taking “under advisement” the pending motion to dismiss. Trial Tr. (Aug. 10, 2015) at 67.

At the end of TulyNET and WTXC’s case-in-chief, Sidya again moved to dismiss their claims. In response, TulyNET and WTXC’s counsel conceded that WTXC, TulyNET’s wholly owned subsidiary, “conducted business in Virginia” and “[would] be required” to obtain a certificate of registration. J.A. at 421. But the parent company, counsel argued, need not do so because it was not transacting business in Virginia. Without specifically addressing this argument, the trial court denied the motion to dismiss on the ground that a party may obtain an

The judgment order does not enter judgment in favor of TulyNET’s subsidiary, World Telecom Exchange Communications, LLC, one of the originally named plaintiffs — a point that Sidya correctly observes on appeal. *See* Oral Argument Audio at 1:51 to 1:58, 2:45 to 2:48, 4:53 to 4:58; Appellant’s Br. at 31. At no point during or after the trial court proceedings did WTXC and TulyNET seek to amend the final judgment order to include WTXC.

SCC certificate anytime “prior to entry of the final judgment” and thus a case may proceed until then. *Id.* at 423.

At the conclusion of trial, Sidya renewed his motion to dismiss. Tulynet and WTXC defended the motion not only by contesting whether Tulynet needed to obtain an SCC certificate, but also by representing that, in any event, Tulynet was “pursuing” an effort to obtain an SCC certificate and “get it filed” at some point “before the entry of a final order.” *Id.* at 634. The court again denied the motion to dismiss. The case proceeded to verdict and a partial final judgment. At no point prior to final judgment did Tulynet obtain an SCC certificate.

II.

Sidya appeals on various grounds, including that the trial court erred as a matter of law by allowing Tulynet to litigate its claims to final judgment without first obtaining an SCC certificate. We agree and find this ground dispositive of these consolidated appeals.²

A.

Neither a foreign limited liability company nor a foreign corporation — if it transacts business in the Commonwealth — may maintain any proceeding in Virginia courts until it has obtained an SCC certificate. *See* Code §§ 13.1-758(A), 13.1-1057(A).³ An entity which

² On appeal, Sidya also raises several challenges to the sufficiency of the evidence supporting the jury’s verdict and the court’s partial final judgment. Sidya makes these arguments, however, “[i]n the alternative,” in the event that we do not “dispose of the entire case” on the basis of Tulynet’s failure to obtain an SCC certificate. Reply Br. at 15. Given our holding, we do not address the merits of the alternative arguments in Record Nos. 160672 and 160895. *See Commonwealth v. White*, ___ Va. ___, ___, 799 S.E.2d 494, ___, Record No. 160879, 2017 Va. LEXIS 78, at *10 (June 1, 2017) (reaffirming that “the doctrine of judicial restraint dictates that we decide cases ‘on the best and narrowest grounds available’” (alteration and citation omitted)). We similarly offer no opinion on Tulynet and WTXC’s appeal in Record No. 160666 contesting the trial court’s order refusing to award treble damages and striking the jury’s award of attorney fees. These issues are now moot given our vacatur of the partial final judgment.

³ Tulynet argues on appeal that it is not a foreign limited liability company under Code § 13.1-1057(A), but instead is “a foreign corporation with limited liability” because it can issue shares. Appellees’ Br. at 26-27. We find this argument unavailing because Code § 13.1-758(A) contains a provision for foreign corporations similar to that which Code § 13.1-1057(A) contains for foreign limited liability companies. *See* Code § 13.1-758(A) (“A foreign corporation transacting business in the Commonwealth without a certificate of authority may not maintain a proceeding in any court in the Commonwealth until it obtains a certificate of authority.”); *see*

conducts its business through a subsidiary acting as an agent in Virginia is transacting business in Virginia. *See Rock-Ola Mfg. Corp. v. Wertz*, 249 F.2d 813, 816 (4th Cir. 1957) (noting that “if the foreign corporation has an agent to whom it delegates an essential corporate function, the acts of the agent may constitute the doing of business by the principal”); *Questech, Inc. v. Liteco, AG*, 735 F. Supp. 187, 188 (E.D. Va. 1990) (“A master-servant or a principal agent relationship should be established between the foreign corporation and the local dealer or distributor, or acts of the foreign corporation on their own must amount to transacting business.”); Joseph Henry Beale, Jr., *The Law of Foreign Corporations and Taxation of Corporations Both Foreign and Domestic* § 206, at 333 (1904) (“A foreign corporation can act only through an agent; and consequently if an ordinary agent is appointed by the company and permanently established in the State to carry on the business of the company, the company is doing business in the State. The clearest case of this sort is the appointment of a resident manager for a branch office”); *cf. Thaxton v. Commonwealth*, 211 Va. 38, 43-47, 175 S.E.2d 264, 268-70 (1970) (concluding that a foreign corporation was transacting business in Virginia through its agent, which required it to obtain a certificate of authority).

Though an entity need not obtain an SCC certificate prior to instituting the proceeding, we have consistently interpreted these provisions to require the party to obtain “a certificate from the State Corporation Commission *before the trial court enter[s] its final order.*” *Nolte v. MT Tech. Enters., LLC*, 284 Va. 80, 90-92, 726 S.E.2d 339, 345 (2012) (emphasis added); *see also Video Eng’g Co. v. Foto-Video Elecs.*, 207 Va. 1027, 1029-31, 154 S.E.2d 7, 8-10 (1967) (collecting cases and agreeing with the proposition that “compliance with the requirements of the statute before judgment is sufficient to entitle the corporation to continue its prosecution”); *Phlegar v. Virginia Foods, Inc.*, 188 Va. 747, 751-52, 51 S.E.2d 227, 229-30 (1949) (applying *Bain v. Boykin*, 180 Va. 259, 263-66, 23 S.E.2d 127, 129-30 (1942), to find that a certificate is sufficient if filed “prior to the time of final judgment”).⁴

also J.A. at 134a (moving, on the morning of trial, to dismiss Tulynet’s claims because it was a “foreign corporation” doing business in Virginia without obtaining an SCC certificate).

⁴ On appeal, Tulynet obtained for the first time a certificate of authority from the SCC. For the purposes of Code §§ 13.1-758(A) and 13.1-1057(A), however, the trial court proceeding ended for Tulynet upon the entry of the partial final judgment in its favor. *See Nolte*, 284 Va. at 91-92, 726 S.E.2d at 345; *Video Eng’g Co.*, 207 Va. at 1029-31, 154 S.E.2d at 8-10; *Phlegar*, 188 Va. at 751, 51 S.E.2d at 229; *see also Transportation Ins. v. El Chico Rests., Inc.*, 524

B.

Tulynet did not obtain an SCC certificate prior to the entry of final judgment. As the parties concede, however, the trial court made no factual findings on whether Tulynet transacted business in Virginia. *See* Oral Argument Audio at 19:08 to 19:17, 24:09 to 24:25; Appellees’ Br. at 29. Sidya argues on appeal that the trial court erred in not making factual findings and that, if it had done so, there was only one conclusion that it could have reached: Tulynet was transacting business in Virginia. *See* Oral Argument Audio at 25:00 to 25:12. Focusing solely on Tulynet and WTXC’s pleadings and evidence, we agree. Treating its subsidiary as an agent and arm of operation, Tulynet transacted business in Virginia and, thus, was obligated to obtain an SCC certificate.

1.

Tulynet, a private foreign company organized in Dubai of the United Arab Emirates, is owned by a single individual. Tulynet, in turn, wholly owns WTXC, which has its principal place of business in Virginia. The parties concede that WTXC transacted business in Virginia during the relevant time frame and obtained a certificate of registration prior to trial. *See* J.A. at 421, 427.

Tulynet and WTXC’s joint complaint alleged that, “[c]ollectively,” both companies were in the wholesale telephony business, meaning that they bought and sold telephone minutes in emerging markets. *Id.* at 8. The complaint made clear the extent of this joint enterprise:

- “[I]n addition to their relationship as parent-subsidary companies, WTXC and [Tulynet] agreed to a business relationship whereby each company would provide certain services to the other to facilitate their respective business objectives to market and provide telecommunications services.” *Id.*

S.E.2d 486, 488 (Ga. 1999) (noting that interpreting the word “maintain” to allow an unregistered foreign corporation to “initiate” but not “continue” an action “allows an aggrieved party the opportunity to preserve its cause of action *but not to reduce it to judgment* until the certification process is followed”) (emphasis added) (citation omitted)); *International Inventors, Inc., E. v. Berger*, 363 A.2d 1262, 1264 (Pa. Super. Ct. 1976) (“Had the appellee secured a certificate of authority during the course of the proceedings below, we would be inclined to reject the appellant’s argument. . . . While ‘maintaining’ a suit requires more than merely instituting suit, it is obvious that a suit has been ‘maintained’ when a final determination of an issue has been reached.”).

- The former CEO of WTXC “*effectively worked for [Tulynet], at a minimum as an agent*, because he held himself out to be [Tulynet’s] CEO and performed CEO level functions for [Tulynet], including negotiating contracts and other business relationships with [Tulynet] customers, suppliers and vendors.” *Id.* at 6 (emphasis added).
- Two employees named as individual defendants and working at the direction of the former WTXC CEO provided technical and sales “support for WTXC *and [Tulynet]*” in Virginia. *Id.* (emphasis added).
- Along with them, two other WTXC employees, though not residing in Virginia, worked on behalf of or acted as agents of Tulynet while being employed by the Virginia-based subsidiary. *See id.* at 5, 7, 10, 13, 14-15; R. at 1994, 1996, 1998.⁵
- Employees of WTXC had access to company pricing data through their employment with WTXC and their “*relationship with [Tulynet].*” J.A. at 25 (emphasis added).

The joint complaint filed by Tulynet and WTXC thus demonstrates that the parent company, operating through its wholly owned subsidiary, maintained agents and employees in Virginia who were conducting business on behalf of both companies.

2.

In pretrial discovery and motions practice, Tulynet and WTXC reinforced the unitary nature of their business relationship. For example, they sought discovery from two former WTXC employees named as defendants about any communications regarding their “intent to resign from WTXC *and [Tulynet].*” R. at 38, 528-29 (emphasis added). In a response to an interrogatory, WTXC referred to itself and Tulynet as a singular entity operating the same telecommunications route. *See id.* at 1101 (referring to “WTXC *and Tulynet’s* prices with its ‘bread and butter’ route” (emphases added)).

In its opposition to Sidya’s motion to quash service of process and to dismiss, Tulynet and WTXC, referring to themselves “collectively” as WTXC, went so far as to state that “[a]t the time the bad acts occurred, WTXC was a wholesale telecommunications company *operating out of McLean, Virginia*” and to describe WTXC as “*a Virginia-based business*” and a “profitable

⁵ The pagination for citations to the Record is taken from the trial court record in Case Number CL-2014-09553.

business located in McLean, Virginia.” *Id.* at 410-12, 415 (first emphasis added); *see also id.* at 854 (stating again that “WTXC was a wholesale telecommunications company operating out of McLean, Virginia”). In ruling on this motion to quash service and to dismiss, the trial court accepted Tulynet and WTXC’s conflation of their roles and stated: “The Court’s findings and analysis [are] as follows. *Plaintiff Tulynet FZ LLC*, formerly known as World Telecom Exchange Carrier FZ, LLC, or WTXC, *has offices in McLean, Virginia* and is *a company* that engages in what *it* describes as technical engineering aspects of voice and data traffic aggregation.” *Id.* at 868 (emphases added).

3.

The evidence which Tulynet and WTXC presented at trial confirmed the inseparable relationship between the two entities. The sole owner of Tulynet testified that when he learned that several employees in Virginia were resigning, he traveled to Virginia twice to personally “reassur[e]” them “that we, as *the company*, [were] 100 percent behind them and [were] investing in them and paying their salaries.” J.A. at 179-84 (emphasis added). He said that the resignations surprised him because “we were paying them good salaries.” *Id.* at 184. After the employees resigned, Tulynet’s owner became the sole remaining officer of WTXC and made all hiring, firing, and other management decisions regarding WTXC. *See id.* at 667, 705; Def.’s Exs. 134, 137; Hr’g Tr. (June 18, 2015) at 62-64, 92; Trial Tr. (Aug. 11, 2015) at 60. Tulynet’s owner described himself as “running the business” and “recruiting new people” during this period. Hr’g Tr. (June 18, 2015) at 112; *see also* J.A. at 184. Even before the resignations, he received cash reports for both the Dubai and United States entities from employees in Virginia and provided accounting instructions to those Virginia employees. *See* Def.’s Exs. 112, 114, 119.

Additionally, the contract between Tulynet and Sidya’s company provided that all notices required to be sent to Tulynet must be sent directly to McLean, Virginia. *See* J.A. at 803. An appendix to that contract also provided a list of contacts who were WTXC employees based in Virginia. *See id.* at 807. Sidya sent an email regarding his company’s rate increase to WTXC employees in Virginia. *See id.* at 308, 675. In regard to WTXC receiving that rate-increase notice, Tulynet and WTXC’s own counsel referred to “WTXC in Virginia as a service agent” for Tulynet. *Id.* at 308. And when Tulynet and WTXC’s expert testified as to the damages that

these entities suffered, he stated that his valuation computation of TulyNET was based on “consolidated financials” that included both entities. *Id.* at 414-17.

Ending any arguable doubt on the subject, WTXC’s own “Corporate Information” document — marked “Private & Confidential” — explained that WTXC served merely as a “technical ‘arm’ of the company” for “fiscal reasons so as to ensure that the majority of profits are reali[z]ed in Dubai” Def’s Ex. 134 (emphases added). This statement confirms what the pleadings and the evidence render incontestable: TulyNET transacted business in Virginia and thus was required to obtain an SCC certificate prior to the entry of a final judgment order.

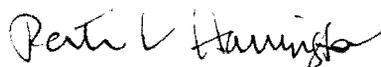
III.

In sum, the trial court erred as a matter of law by allowing TulyNET to litigate this action to final judgment without first obtaining an SCC certificate. For this reason, we reverse and vacate the partial final judgment entered in favor of TulyNET FZ, LLC and World Telecom Xchange Carrier FZ, LLC. *See* J.A. at 822-23, 849-51, 871-73. We remand the case to the trial court with instructions (i) to enter a final judgment dismissing TulyNET’s claims against Sidya and (ii) to bring to closure all remaining matters not addressed in the vacated judgment order.⁶

This order shall be certified to the Circuit Court of Fairfax County.

A Copy,

Teste:



Clerk

⁶ At oral argument, Sidya’s counsel asserted that *res judicata* would bar TulyNET from later reasserting its previously dismissed claims against Sidya. *See* Oral Argument Audio at 3:44 to 4:07. None of the parties have briefed this issue, and we offer no opinion on it. *Compare Federal Treasury Enter. Sojuzplodoimport v. Spirits Int’l B.V.*, 809 F.3d 737, 745 (2d Cir.), *cert. denied*, ___ U.S. ___, 137 S. Ct. 160 (2016), *United Med. Mgmt. Ltd. v. Gatto*, 57 Cal. Rptr. 2d 600, 604 (Cal. Ct. App. 1996), *National Heritage Corp. v. Mount Olive Mem’l Gardens, Inc.*, 260 S.E.2d 1, 2-3 (Ga. 1979), and *Recho Corp. v. California Pizza Kitchen, Inc.*, 383 S.E.2d 643, 645-46 (Ga. Ct. App. 1989), *with Pennconn Enters., Ltd. v. Huntington*, 538 A.2d 673, 678 (Vt. 1987), and *Restatement of Judgments* § 49 cmt. a, at 194 (1942).