

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

LEO E. STRINE, JR.
CHANCELLOR

New Castle County Courthouse
Wilmington, Delaware 19801

Date Submitted: February 13, 2013

Date Decided: February 28, 2013

Robert G. Gallagher, Esquire
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David L. Finger, Esquire
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RE: Gallagher v. Long
Civil Action No. 8181-CS

Dear Mr. Gallagher and Mr. Finger:

I have before me three motions in the above captioned matter. The defendant, Mr. Richard Long, has moved to dismiss the complaint of Mr. Robert Gallagher, the plaintiff, in which Mr. Gallagher alleges that Mr. Long, as the liquidating trustee of a limited liability company, breached his fiduciary duties and deprived Mr. Gallagher of money due to him after the limited liability company's dissolution. Mr. Gallagher, who is proceeding pro se, has moved to have me recuse myself from this case, on account of remarks I made in a bench ruling when dealing with this matter six years ago. Mr. Gallagher has also moved to have oral argument on this matter. For the reasons that follow, I deny Mr. Gallagher's motion to recuse and his motion for oral argument. I grant Mr. Long's motion to dismiss on the ground that Mr. Gallagher's complaint is time-barred.

The motions arise out of an action that came before me in 2006 and grabbed some headlines on account of the lurid subject matter of the assets in dispute.¹ In that year, Mr. Gallagher, together with his partner, Ms. Betty Franklin, agreed with Mr. Long to form a joint venture to exploit memorabilia related to Elvis Presley that had been assembled by Elvis's "physician," Dr. George Nichopoulos.² Mr. Gallagher had custody of the memorabilia, and had previously been exhibiting them under the name "Dr. Nick's Memories of Elvis."³ The parties agreed that Mr. Long would create a Delaware limited liability company, LGF Enterprises, LLC ("LGF"), which would buy the memorabilia from Dr. Nichopoulos for \$1 million.⁴ Mr. Gallagher and Ms. Franklin would assign to LGF all rights they had in the memorabilia, together with three tractor-trailers that Mr.

¹ See Compl., *Long v. Gallagher*, C.A. No. 2553-VCS (Nov. 17, 2006). All citations with date but without jurisdiction refer to this previous action.

² Among the detritus the King's medical doctor collected and then exploited for personal gain were:

- "Larynge[a]l Scope:
Use[d] to examine Elvis' chronic sore throat & tonsils; also used to examine Elvis' throat before & after concerts. Dr. Nick had to take additional schooling to learn how to use this.
- "Nasal Douche:
Glass nasal douche, a mixture of warm salt water was used to irrigate Elvis' sinuses before each show."

Other items included guns, books, pictures, and watches. Am. Compl. Ex. 2, at Ex. A (Jan. 4, 2007) ("Assignment and Sale Agreement" (Apr. 2006)) [hereinafter Sale Agreement].

³ See Am. Compl. ¶¶ 5, 7, 15 (Jan. 4, 2007); Sale Agreement § 1(a).

⁴ Am. Ans. Ex. B1 (Dec. 18, 2006) (LGF Operating Agreement (Apr. 2006)); Sale Agreement § 7.

Gallagher had been fitting out to display the exhibits.⁵ Mr. Long was to have a 50% interest in LGF, and Mr. Gallagher and Ms. Franklin were each to have a 25% interest.⁶

The joint venture failed immediately. Mr. Gallagher and Ms. Franklin did not allow Mr. Long to photograph the exhibits and arrange for them to be insured.⁷ The memorabilia were not exhibited at a hotel in Las Vegas, as the parties had planned.⁸ Mr. Long and LGF then filed a motion for specific performance in this court to oblige Mr. Gallagher and Ms. Franklin to deliver the memorabilia, which were being stored in an airport hangar in Minden, Nevada.⁹ Mr. Gallagher moved to dismiss the complaint, and also moved to rescind LGF's operating agreement.¹⁰ Mr. Long then moved for an order compelling inspection of the memorabilia.¹¹ Mr. Gallagher filed written objections, and asked the court to change the date of the hearing on the motion to fit it more easily to his schedule, which the court agreed to do.¹² But, when the hearing came, neither Mr. Gallagher nor Ms. Franklin appeared, nor did a lawyer on their behalf.¹³ I granted Mr. Long's motion to have access to the memorabilia.¹⁴ Mr. Gallagher and Ms. Franklin did

⁵ Am. Compl. Ex. 3, at Ex. A (Jan. 4, 2007) (“Contribution and Joinder Agreement” (Apr. 2006)).

⁶ Contribution and Joinder Agreement § 7.

⁷ Am. Compl. ¶ 16 (Jan. 4, 2007).

⁸ *Id.* ¶ 17.

⁹ Am. Compl. (Jan. 4, 2007).

¹⁰ Mot. to Dismiss (Jan. 9, 2007); Mot. to Rescind Operating and Joinder Agreement (Jan. 11, 2007).

¹¹ Mot. for an Order Compelling Inspection (Jan. 17, 2007).

¹² *E.g.*, Defs.’ Opp’n to Pls.’ Mot. for an Order Compelling Inspection (Jan. 23, 2007); Letter to the Court (Feb. 13, 2007) (regarding hearing date).

¹³ *See* Tr. of Oral Arg. (Mar. 26, 2007).

¹⁴ Order (Mar. 27, 2007).

not permit the inspection. After another hearing, which Mr. Gallagher and Ms. Franklin again refused to attend, I entered an order holding them in contempt of court, and requiring them to return items of memorabilia that had been removed from the hangar.¹⁵ I also required Mr. Gallagher and Ms. Franklin to appear in Delaware for their depositions.¹⁶ Again, Mr. Gallagher and Ms. Franklin did not comply with my orders, or appear in Delaware. Mr. Long moved for a second finding of contempt, this time seeking “severe sanctions,” including imprisonment, to force the defendants to comply with this court’s orders.¹⁷ He also moved to dissolve LGF and wind up its affairs.¹⁸

I scheduled a hearing on Mr. Long’s motion on July 19, 2007.¹⁹ It is this hearing that has given rise to Mr. Gallagher’s motion to have me recuse myself from this case. At the hearing, I *refused* to have Mr. Gallagher imprisoned as a remedy against his contempt. That is, despite Mr. Gallagher’s continued failure to appear and to comply with his legal obligations and this court’s order, I *denied* Mr. Long’s motion to imprison Mr. Gallagher. Instead, I permitted Mr. Long and LGF an “incremental” remedy.²⁰ I ruled that LGF was the owner of all the memorabilia and the three tractor-trailers, that LGF was to be dissolved, and that Mr. Long was entitled to seize and sell LGF’s assets to

¹⁵ Order Finding Defs. in Contempt of Ct. (May 10, 2007); *see* Tr. of Oral Arg. (May 9, 2007).

¹⁶ Order Compelling Defs. to Appear for Deps. (May 10, 2007).

¹⁷ Br. in Supp. of a Mot. for a Rule to Show Cause, at 9 (May 31, 2007).

¹⁸ *See id.* at 11.

¹⁹ *See* Tr. of Hr’g on Pls.’ Mot. for Contempt (July 19, 2007).

²⁰ *Id.* at 10.

recover \$1.2 million he had paid to LGF and lent to Mr. Gallagher.²¹ I also awarded Mr. Long all of his costs, and interest.²² If the assets of LGF were insufficient to cover Mr. Long's \$1.2 million and costs, Mr. Long was permitted "to seek recovery of same from the personal assets of each of the defendants, and any assets jointly owned by the defendants."²³ If there was money left over from the sale of the memorabilia, the balance was to be paid to the defendants.²⁴

Mr. Gallagher and Ms. Franklin appealed my contempt order. The Supreme Court affirmed it in full in November 2007, and denied rehearing en banc.²⁵ On June 26 and 27, 2009, there was an auction of the Elvis memorabilia.²⁶ This netted less than \$1.2 million.²⁷ On February 17, 2010, LGF's certificate of cancellation was filed.²⁸

Now, over three and a half years after the auction, and almost three years after the filing of LGF's certificate of cancellation, Mr. Gallagher sues Mr. Long, alleging that he breached his fiduciary duty as the liquidating trustee of LGF, and seeking an accounting. Mr. Gallagher also moves to have me recuse myself from the case, alleging that I am biased on account of remarks I made in the hearing when I granted Mr. Long a second

²¹ Rev. Final J. & Order § 2(c)-(d) (July 25, 2007).

²² *Id.* § 2(e)-(g).

²³ *Id.* § 2(h).

²⁴ *Id.* § 2(d).

²⁵ *Gallagher v. Long*, 940 A.2d 945 (Del. 2007) (TABLE); Order, *Gallagher v. Long* (Dec. 5, 2007) (No. 383, 2007).

²⁶ V. Compl. Ex. E, at 50; *id.* Ex. G, at 62.

²⁷ The record is unclear on exactly how much the auction did net. The name "Dr. Nick's Memories of Elvis" apparently fetched \$100,000. *Id.* Ex. G, at 67-68.

²⁸ Defs.' Reply Br. Ex. A.

contempt order against Mr. Gallagher and Ms. Franklin, but refused Mr. Long his request to imprison them. I discuss Mr. Gallagher's motion to recuse first.

Mr. Gallagher objects to my use of the words "kill" and "injure" in the hearing in which I granted Mr. Long's contempt order. Mr. Gallagher also attaches as an exhibit to his complaint a letter sent to the court on July 22, 2008, in which he objected to these words, and other language I used in the hearing.²⁹ I quote now the full text of the two paragraphs containing all the language to which Mr. Gallagher objects:

You will have the record of this hearing in which I will be clear to the Nevada court that I am trying—and the last thing I want to do is to burden—the last thing anybody would want to do, or one of the last things I would think, you would certainly not want to kill someone or physically injure them. You don't want to incarcerate someone in a civil proceeding. That rankles—and it is some measure of how ridiculous Mr. Gallagher and Miss Franklin are behaving that I even have to consider such an application in a case like this.

I take it seriously. It is not that your application lacks merit. As a matter of prudence, I think we ought to be incremental about this, and maybe Mr. Gallagher will finally get it, especially since I have no doubt that the Nevada courts will take seriously their obligations under the full faith and credit clause, and they have tools at their disposal. If he is contumacious not only before this Court but before the courts of Nevada, then he will bear the consequences.³⁰

The Supreme Court has held that a judge who is faced with a recusal motion must follow a two-part test:

First, he must, as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party. Second, even if the judge believes that he has no bias, situations may arise

²⁹ Pl's. Mot. to Recuse Ex. A (Letter to the Court (July 16, 2008)).

³⁰ Tr. of Hr'g on Pls.' Mot. for Contempt 10:9-11:5 (July 19, 2007).

where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge's impartiality.³¹

I am confident that there is no need for me to recuse myself. As to the first prong of the test, I am satisfied that I can hear Mr. Gallagher's motion without bias. As to the second prong, I am also confident that my words in the hearing cannot reasonably be construed as a threat to harm Mr. Gallagher. As the transcript of the hearing shows, I was making the point that I was extremely reluctant to threaten Mr. Gallagher and Ms. Franklin with imprisonment. Mr. Gallagher is taking the words "kill" and "injure" wildly out of context. The context was one in which I was explaining to a legitimately frustrated party that was facing unreasonable, contumacious, and civilly illegal behavior that I was, nonetheless, not going to act hastily to have Mr. Gallagher and Ms. Franklin imprisoned. Instead, I would give them *yet another chance* before the more extreme measures sought would be granted. The Supreme Court, when it affirmed the order of contempt, noted that "the Court of Chancery demonstrated commendable patience and forbearance in its dealings with [Mr. Gallagher and Ms. Franklin]."³² It is also worth observing that Mr. Gallagher, despite being in possession of the transcript of the hearing where I made these remarks, and submitting the transcript to the Supreme Court in his appendix on appeal,

³¹ *Home Paramount Pest Control v. Gibbs*, 953 A.2d 219, 222 (Del. 2008) (quotation omitted).

³² *Gallagher v. Long*, 940 A.2d 945, at *2 (Del. 2007) (TABLE). Mr. Gallagher submitted the transcript of the hearing where I made the remarks of which he complains to the Supreme Court in an appendix.

did not complain about the remarks until almost a year after they were made.³³

Therefore, I deny his motion to recuse.

Next, I move on to Mr. Long's motion to dismiss Mr. Gallagher's complaint. Because Mr. Gallagher is proceeding pro se, I interpret his pleading leniently.³⁴ Mr. Gallagher complains, in essence, that Mr. Long did not take proper steps to make sure that the auction was conducted in a manner that maximized the sale value of the memorabilia.³⁵ Mr. Gallagher thus alleges that Mr. Long breached his fiduciary duty, and, as a remedy, seeks an accounting, including his "monetary share of the dissolved LLC."³⁶

Mr. Gallagher's claim for breach of fiduciary duty is time-barred because he had notice of the auction and has articulated no reason for failing to sue within the limitations period. Statutes of limitation are only controlling in actions at law.³⁷ The doctrine of laches applies to equitable actions. But, "[e]quity follows the law and in appropriate circumstances will apply a statute of limitations by analogy."³⁸ The statute of limitations that applies to breaches of fiduciary duty is three years.³⁹ The alleged breach of fiduciary

³³ See Appellant's Op. Br. A462, *Gallagher v. Long* (Del. Sept. 14, 2007) (No. 383, 2007); Letter from Mr. Gallagher to the Court (July 16, 2008).

³⁴ See, e.g., *Smith v. Christina Sch. Dist.*, 1996 WL 757282, at *1 (Del. Ch. Jan. 2, 1997).

³⁵ See, e.g., V. Compl. 2 (alleging that Mr. Long ignored the possibility of selling the memorabilia to "parties [who] had substantial resources available to pay the Trustee a large amount of money for the memorabilia as a unit").

³⁶ *Id.* at 20.

³⁷ See, e.g., *Whittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 8 (Del. 2009).

³⁸ *In re Tyson Foods, Inc., Consol. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007).

³⁹ *Id.* (citing 10 *Del. C.* § 8106).

duty of which Mr. Gallagher complains relates to the auction, which was held in June 2009. Because more than three years have elapsed since that date, and because there is no reason why Mr. Gallagher could not have sued within the statute of limitations, it is appropriate to dismiss Mr. Gallagher's claim of breach of fiduciary duty on grounds of laches.⁴⁰

Moreover, although Mr. Gallagher adverts to actions that occurred within three years of his suit, those actions do not support a conclusion that his complaint was timely filed.⁴¹ For example, when a fiduciary breaches its duties to a member of a limited liability company, that member may in appropriate circumstances obtain an order requiring the fiduciary to account for its actions.⁴² Here, any request for an accounting must be based on a successful claim for breach of fiduciary duty against Mr. Gallagher in his conduct of the sale process leading to and culminating in the auction.⁴³ As a result of a judgment that Mr. Long obtained in this court, and which was affirmed by the Supreme Court in full, Mr. Long and LGF were entitled not only to the first \$1.2 million of the auction proceeds, but also to a full recovery of "all of their costs (of whatever kind) and

⁴⁰ Mr. Gallagher has been litigating in other courts in this time, as Mr. Long points out. Defs.' Mot. to Dismiss ¶ 5 (citing *Gallagher v. Crystal Bay Casino, LLC*, 2012 WL 1409244 (D. Nev. Apr. 20, 2012)).

⁴¹ V. Compl. 8 (noting that LGF's certificate of cancellation was filed within three years of Mr. Gallagher's complaint).

⁴² Cf. *Phillips v. Hove*, 2011 WL 4404034, at *24-25 (Del. Ch. Sept. 22, 2011) (granting accounting remedy for breach of fiduciary duty in limited liability company).

⁴³ See *Stevanov v. O'Connor*, 2009 WL 1059640, at *15 (Del. Ch. Apr. 21, 2009) ("A claim for an accounting in the Court of Chancery generally reflects a request for a particular type of remedy, rather than an equitable claim in and of itself.") (citation omitted).

reasonable attorney's fees" incurred in the litigation and in enforcing the order, and to interest "at the legal rate of 11.25% per annum."⁴⁴

Nothing in Mr. Gallagher's complaint suggests that the auction yielded an amount in excess of \$1.2 million plus the fees and costs Mr. Long incurred—fees and costs that were increased by Mr. Gallagher's contumacious conduct. Indeed, the complaint pleads just the opposite, which is that as a result of Mr. Long's supposed breach of fiduciary duties, the auction yielded a poor value far below the level necessary to satisfy the judgment Mr. Long obtained, leaving no proceeds at all for Mr. Gallagher and Ms. Franklin.⁴⁵ In other words, Mr. Gallagher's request for an accounting is a request for a remedy based on Mr. Long's supposed breach of fiduciary duty for failing to run a faithful sale process and obtain proceeds in excess of the \$1.2 million judgment plus fees and interest. Because Mr. Gallagher seeks this remedy for a time-barred claim, his entire complaint is time-barred.

Finally, I deny Mr. Gallagher's motion for oral argument. Oral argument is at the discretion of the trial court.⁴⁶ Because the record is satisfactory for granting judgment from the briefs, and because Mr. Gallagher did not appear for any of the three hearings scheduled in the prior action, I deny his motion.

⁴⁴ Rev. Final J. & Order § 2(e)-(g) (July 25, 2007).

⁴⁵ *E.g.*, V. Compl. 2, 8.

⁴⁶ *Cf. Castillo v. Clearwater Ins. Co.*, 2012 WL 1410071, at *1 (Del. Sup. Ct. Jan. 25, 2012) ("Oral argument is at the discretion of this Court.").

In conclusion, I DENY Mr. Gallagher's motion to recuse myself from the case, and DENY his motion for oral argument. I GRANT Mr. Long's motion to dismiss on the ground that Mr. Gallagher's complaint is time-barred. IT IS SO ORDERED.

Very truly yours,

/s/ Leo E. Strine, Jr.

Chancellor