

SAM GLASSCOCK III  
VICE CHANCELLOR

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

COURT OF CHANCERY COURTHOUSE  
34 THE CIRCLE  
GEORGETOWN, DELAWARE 19947

Date Decided: June 3, 2013

Michael W. McDermott  
Suzanne Holly  
BERGER HARRIS, LLC  
1201 N. Orange Street  
One Commerce Center, 3<sup>rd</sup> Floor  
Wilmington, Delaware 19801

Craig A. Karsnitz  
Christian D. Wright  
YOUNG CONAWAY STARGATT &  
TAYLOR, LLP  
110 W. Pine Street  
P.O. Box 594  
Georgetown, Delaware 19947

Re: *East Sussex Associates, LLC v. West Sussex Associates, LLC*  
Civil Action No. 6395-VCG

Date Submitted: April 30, 2013

Dear Counsel:

This case arises from a dispute between two tenants-in-common, Petitioner East Sussex Associates, LLC (“East”) and Respondent West Sussex Associates, LLC (“West”), each of which owns a one-half interest in real estate in Sussex County. On April 19, 2011, East filed its Petition (the “Delaware Action”) seeking reformation of the parties’ tenant-in-common agreement (“TIC Agreement”) to eliminate a section of the agreement which purported to waive the parties’ rights to seek partition of the jointly owned property. In the alternative, East sought a declaratory judgment that the waiver of the right to partition was invalid. West brought counterclaims for fraud, breach of contract, and breach of fiduciary duties.

The Delaware Action is not the only litigation between these two parties concerning the TIC Agreement. On March 25, 2011, less than one month before East brought this action, West filed suit in Virginia (the “Virginia Action”) alleging conversion, breach of contract, and breach of fiduciary duties. Fortunately, the parties have since agreed that West would buy out East’s 50% ownership interest in the disputed properties, and that East’s petition and West’s counterclaims in the Delaware Action should be voluntarily dismissed in favor of resolving the first-filed Virginia Action. East’s original Motion for Voluntary Dismissal under Rule 41(a)(2) was filed on October 24, 2012. On January 8, 2013, East amended its Motion, and asked me to dismiss West’s counterclaims under Rule 12(c) for lack of subject matter jurisdiction.

On February 1, 2013—the date that an answering brief was due to respond to East’s Motion to Dismiss—West filed its own Motion for Voluntary Dismissal under Rule 41(a)(2). Notwithstanding the parties manifest agreement not to proceed in Delaware, East *opposed* West’s motion for voluntary dismissal—alleging gamesmanship on West’s part in initially opposing joint voluntary dismissals—and now asks me to adjudicate its Rule 12(c) Motion to Dismiss on the merits. For the reasons that follow, I decline to do so, and I grant each parties Motion for Voluntary Dismissal.

## I. ANALYSIS

West seeks voluntary dismissal under Chancery Court Rule 41(a)(2). Under that Rule, the Court has discretion to enter a voluntary dismissal. Such discretion generally is exercised in favor of a dismissal without prejudice unless the defendant (or counterclaim defendant) will suffer plain legal prejudice thereby.<sup>1</sup> Here, East does not argue that the dismissal will be prejudicial. In fact, although this matter has grown old in its sojourn in this Court, it has done so in indolence, and the litigation energy has all been expended, it appears, in the Virginia Action.

Rather than attempt to show that it will suffer prejudice if West's motion is granted, East argues that West is not entitled to voluntary dismissal without prejudice here by operation of Rule 15(aaa). Rule 15(aaa) requires a plaintiff that wishes to amend its complaint in response to a motion to dismiss to file its amended complaint before responding to the motion to dismiss.<sup>2</sup> When a court dismisses a complaint after full briefing in the absence of a timely motion to amend, the dismissal shall be with prejudice unless the plaintiff can show "good cause [why] dismissal with prejudice would not be just under all the

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<sup>1</sup> *In re Marriott Hotel Props. II Ltd. P'ship Unitholders Litig.*, 1997 WL 589028, at \*6 (Del. Ch. Sept. 17, 1997) ("To defeat the Rule 41(a)(2) motion, defendants are required to satisfy the burden of demonstrating 'plain legal prejudice.'").

<sup>2</sup> Ct. Ch. R. 15(aaa).

circumstances.”<sup>3</sup> The rule is intended to conserve litigants’ and judicial resources by discouraging a party from briefing a dispositive motion before filing an amended complaint.

The rule also applies to motions for voluntary dismissal, where the same considerations apply. Rule 15(aaa) provides that “Rule[] 41(a) . . . shall be construed so as to give effect to this subsection (aaa).”<sup>4</sup> Rule 41(a) provides a plaintiff the right to seek voluntary dismissal without prejudice. Allowing such dismissal after a motion to dismiss has been fully briefed presents the same mischief that Rule 15(aaa) seeks to prevent in the context of a motion to amend the complaint. In *Stern v. LF Capital Partners*, the Court considered such a case. The plaintiffs in *Stern* filed a notice of voluntary dismissal without prejudice under Rule 41(a)(1), *after* the parties had fully briefed and argued a motion to dismiss.<sup>5</sup> The Court found that the dismissal was ineffective, because allowing a plaintiff to voluntarily dismiss an action without prejudice after it had chosen to respond to a motion to dismiss would “substantially interfere with the intended operation of Rule 15(aaa).”<sup>6</sup> The Court found that Rule 15(aaa) gave the plaintiffs the choice

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Stern v. LF Capital P’rs, LLC*, 820 A.2d 1143, 1144 (Del. Ch. 2003).

<sup>6</sup> *Id.* at 1147.

“either to stand on the complaint and answer the motion or, instead, to amend or seek leave to amend the complaint before the response to the motion is due.”<sup>7</sup>

Now, East argues that *Stern* stands for the proposition that the Plaintiff’s *only* options in the face of a motion to dismiss are to answer the motion or amend its Complaint. East ignores a third option available to the Plaintiffs: file a motion for voluntary dismissal. Nothing in the Rules or *Stern* indicates that this course of action would be problematic. On the contrary, in *Stern* the Court made clear that a plaintiff will only be unable to invoke Rule 41(a) in the event “the time for amendment has passed under [Rule 15(aaa)].”<sup>8</sup> Implicit in that statement is the notion that at any time before an answering brief is due in response to a motion to dismiss, a plaintiff is free to file a notice of voluntary dismissal. Furthermore, Rule 41(a)(1) expressly states that a notice of voluntary dismissal shall not be effective “where the complaint is subject to a motion to dismiss and the plaintiff has chosen to file an answering brief rather than seeking to amend.”<sup>9</sup> The Rule plainly countenances the possibility that a motion for voluntary dismissal is a proper response to a motion to dismiss, so long as the Rule 41(a) motion is filed before an answering brief on the motion to dismiss is due.

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<sup>7</sup> *Id.* at 1144.

<sup>8</sup> *Id.* at 1147.

<sup>9</sup> Ct. Ch. R. 41(a)(1) (citing Rule 15(aaa)).

To construe Rule 15(aaa) as East argues is not compelled by the holding in *Stern* and is not compatible with the rationale of Rule 15(aaa): defend the motion to dismiss or take action to moot it—not both. Unlike the plaintiff in *Stern*, West is not seeking to circumvent Rule 15(aaa) with its Rule 41(a) Motion. Rather, West has simply elected to move this matter forward in Virginia, rather than Delaware. This violates neither the letter nor the spirit of Rule 15(aaa). Because West filed its notice of voluntary dismissal before its answering brief was due in response to East’s motion to dismiss, Rule 15(aaa) is no bar to my granting a dismissal without prejudice.

West’s Motion to Voluntarily Dismiss its claims is granted. IT IS SO ORDERED.

Sincerely,

*/s/ Sam Glasscock III*

Sam Glasscock III