

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

E-BIRCHTREE, LLC, a Delaware limited liability company, and WILLIAMS NATURAL GAS LIQUIDS, INC., a Delaware corporation,

Plaintiffs,)

v.) C.A. No. 06C-07-200 MMJ

ENTERPRISE PRODUCTS OPERATING)
L.P., a Delaware limited partnership; and)
E-CYPRESS LLC, a Delaware limited)
liability company,)

Defendants.)

MEMORANDUM OPINION

Submitted: November 3, 2006

Decided: January 18, 2007

***Upon Defendants' Motion To Dismiss, Or In The Alternative,
To Stay, Pursuant to Superior Court Civil Rule 12(b)(3)***

GRANTED IN PART, DENIED IN PART

Samuel A. Nolen, Esquire, Jeffrey L. Moyer, Esquire, Richards, Layton & Finger,
Wilmington, Delaware, Michael J. Gibbens, Esquire, Crowe & Dunlevy, Tulsa,
Oklahoma (Argued), Attorneys for Plaintiffs

S. Mark Hurd, Esquire, Samuel T. Hirzel, Esquire, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, Kathleen Bone Spangler, Esquire, D. Gibson Walton, Esquire (Argued), Vinson & Elkins, Raymond P. Albrecht, Esquire, Enterprise Productions, Attorneys for Defendants

JOHNSTON, J.

Procedural Context

Plaintiffs E-Birchtree, LLC (a Delaware limited liability company) and Williams Natural Gas Liquids, Inc. (a Delaware corporation) (collectively “E-Birchtree”) filed a complaint in this Court against defendants Enterprise Products Operating L.P. (a Delaware limited partnership) and E-Cypress, LLC (a Delaware limited liability company) (collectively “Enterprise”). The principal place of business for both plaintiffs is Tulsa, Oklahoma. The principal place of business for both defendants is Houston, Texas.

The Delaware Action

The Delaware complaint was filed on July 25, 2006. E-Birchtree seeks declaratory relief. E-Birchtree contends that:

5. On July 31, 2002 E-Birchtree and E-Cypress executed a Purchase and Sale Agreement..., pursuant to which E-Cypress agreed to purchase and E-Birchtree agreed to sell membership interests in various companies for an aggregate purchase price of \$254,800,000.
6. Also on July 31, 2002, E-Birchtree and Enterprise executed a Purchase and Sale Agreement..., pursuant to which Enterprise agreed to purchase and E-Birchtree agreed to sell membership interests in various companies for an aggregate purchase price of \$980,169,097.30

The first agreement relates to the sale of E-Birchtree’s interests in various companies that owned and operated the Mid-Atlantic Pipeline system. Mid-Atlantic is a natural gas liquids pipeline system operating in thirteen states. The

second agreement reflects E-Birchtree's agreement to sell, to an Enterprise affiliate, E-Birchtree's interests in various companies that owned and operated the Seminole Pipeline system. The parties expressly agreed that the contracts shall be construed in accordance with Delaware law.

The Delaware complaint further asserts that Enterprise claims that E-Birchtree has breached certain representations and warranties contained in the agreements, resulting in damages in the amount of \$25 million to \$30 million. E-Birchtree requests that this Court declare that Enterprise's potential breach of contract claims are time-barred because the claims are subject to the three-year statute of limitations set forth in 10 *Del. C.* §§ 8106 and 8121. E-Birchtree also requests that this Court enter a judgment declaring that E-Birchtree has not breached the terms of the agreements.

The Texas Action

On July 27, 2006, two days after the filing of the Delaware complaint, Enterprise Products Operating L.P. filed a petition in the District Court of Harris County, Texas against E-Birchtree, LLC, The Williams Companies, Inc. and Williams Natural Gas Liquids, Inc. (for purposes of this decision, these three parties also shall be referred to as "E-Birchtree"). The Texas petition asserts, in connection with the agreement at issue in the Delaware action, that E-Birchtree:

(1) made inaccurate representations and warranties relating to environmental, health and safety issues; (2) failed to disclose material legal proceedings pending against E-Birchtree; and (3) refused to indemnify Enterprise for losses resulting from inaccuracies in representations and warranties. Enterprise seeks relief in Texas in the form of damages arising from alleged breaches of contract.

On September 1, 1006, E-Birchtree moved the Texas court for an order staying the action. By Order dated October 20, 2006, the District Court of Harris County, Texas ruled: “After considering the Motion, the Response, and the arguments of counsel, the Court concludes that the Motion to Stay is DENIED.”

**Defendants’ Motion to Dismiss or, in the Alternative,
to Stay the Delaware Action**

On August 23, 2006, Enterprise filed Defendants’ Motion to Dismiss or, in the Alternative, to Stay. This Court held oral argument on October 23, 2006. The parties filed post-hearing submissions.

The parties made numerous arguments in support of their positions. Central to Enterprise’s dismissed motion is the applicable statute of limitations. Although there is some dispute,¹ all parties recognize that, if this case proceeds in Delaware,

¹During oral argument, the Court asked whether there is any dispute among the parties that if this case proceeds in Delaware, the Delaware statute of limitations would apply. Counsel for Enterprise responded:

No dispute at all, Your Honor, it is procedural. It is procedural here in Delaware,
(continued...)

the three-year statute of limitations potentially will apply to bar this action. The agreements were entered into (and thus the representations and warranties at issue were made) as of July 30, 2002 and July 31, 2002. In the Texas action, a four-year statute of limitations applies and that case would not be time-barred.²

This Delaware case was filed two days before the Texas action. Ordinarily, the first-filed action will not be stayed to permit prosecution of a subsequent action filed in another forum. However, this rule is not hard and fast. Circumstances may dictate that a stay is appropriate. The granting or denial of a stay is within the discretion of the trial court.³

Where all parties are Delaware entities, a plaintiff's choice of a Delaware forum is presumed to be proper and must be accorded due deference.⁴

¹(...continued)

it's procedural in Texas.... In Texas there would be a four-year statute of limitations in this case.... I want to make sure that the Court is aware that we believe we have defenses on many of our claims to the three-year statute of limitations as well, but it is not the clear bright line that you have that we were trying to avoid by filing before the four-year statute of limitations ran in Texas....

Counsel for E-Birchtree stated:

I think you should assume it is an open issue, Your Honor, and I think you should focus on the merits-based claim. I don't think that it is absolutely clear that the Delaware statute of limitations applies. I think it does.

²Tex. Civ. Prac. & Rem. Code § 16.004(a)(3).

³*Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 36-37 (Del. 1991); *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 682-83 (Del. 1964).

⁴*Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Refining, L.P.*, 777 A.2d (continued...)

The Court must consider the following factors:

- (1) the relative ease of access to proof;
- (2) the availability of compulsory process for witnesses;
- (3) the possibility of the view of the premises, if appropriate;
- (4) the applicability of Delaware law;
- (5) the pendency of any similar action in another jurisdiction; and
- (6) all other practical considerations that would make the trial easy, expeditious and inexpensive.⁵

The parties addressed these factors in detail. The parties agree that the Delaware and Texas actions are similar. The issues arise out of a common nucleus of operative fact. Although not identical, the parties are substantially the same.⁶ A view of the premises is not applicable. The agreements require that Delaware law applies to the substantive issues of contract interpretation. Neither party has presented any specific evidence as to whether or not non-party witnesses would be subject to compulsory process.

⁴(...continued)
774, 778 (Del. 2001); *Chrysler First Business Credit Corp. v. 1500 Locust Ltd. Partnership*, 669 A.2d 104, 105 (Del. 1995).

⁵*Cryo-Maid*, 198 A.2d at 684; *Parvin v. Kaufmann*, 236 A.2d 425, 427 (Del. 1967).

⁶*See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281, 283 (Del. 1970).

The point of contention is factor one - the relative ease of access to proof.

By affidavit, E-Birchtree contends:

2. Enterprise Products Operating L.P.'s principal place of business is in Texas. Williams Natural Gas Liquids, Inc. is licensed to do business in Texas, has a registered agent in Texas, and a major office located in Houston, Texas. Williams Natural Gas Liquids, Inc., and E-Birchtree L.L.C., have their principal place of business in Tulsa, Oklahoma. No party to this case has its home office in Delaware.
3. The Purchase Agreements discussed in the Complaint in this case were negotiated in Texas. Moreover, the pipelines at issue deliver to Texas, New Mexico and the Midwest from the Rocky Mountain states, Kansas and Canada. None of the facilities involved are located in Delaware.

Enterprise counters that E-Birchtree has failed to make the required particularized showing that litigating this case in Delaware would cause E-Birchtree hardship and inconvenience.

Even if this Court were to find that Texas is a more convenient forum for the litigation, that is not the salient inquiry. Relative convenience is irrelevant. The question is whether the moving party has met its burden of demonstrating *overwhelming hardship* from being required to litigate in Delaware.⁷ The Court finds that E-Birchtree has failed to demonstrate inconvenience and hardship

⁷*Candlewood Timber Group, LLC. v. Pan American Energy, LLC*, 859 A.2d 989, 999-1000 (Del. 2004).

sufficient to justify dismissal or stay of the Delaware action on the basis of *forum non conveniens*.⁸

But, the analysis does not end here. “[U]se of a declaratory judgment action to anticipate and soften the impact of an imminent suit elsewhere for the purpose of gaining an affirmative judgment in a favorable forum requires a closer look at the deference historically accorded a prior filed action.”⁹ Additionally, Delaware courts take a “rather dim view of declaratory judgment claims of non-breach made for purposes of forum shopping.”¹⁰

In the Delaware action, E-Birchtree (the plaintiffs) is the natural defendant, and Enterprise (the defendants) is the natural plaintiff. In contrast, the parties are (re)aligned properly as natural plaintiff and defendant in the Texas action. The obvious advantage to E-Birchtree by filing in Delaware is the hoped-for application of the three-year statute of limitations, which would foreclose Enterprise’s action on the merits.

⁸See *ANR Pipeline Co. v. Shell Oil Co.*, 525 A.2d 991, 992 (Del. 1987).

⁹*Playtex, Inc. v. Columbia Casualty Co.*, 1989 WL 40913, at 4 (Del. Super.), citing *Air Products and Chemicals, Inc. v. Lummus Co.*, 252 A.2d 545 (Del. Ch. 1968), *rev’d on other grounds*, 252 A.2d 543 (1969).

¹⁰*In re Delta and Pine Land Co. Shareholders Litigation*, 2000 WL 1010584, at 5 (Del. Ch.).

The Texas court already has ruled that the action before it shall proceed. That court has scheduled trial to commence in August of 2007. If the Delaware action is neither dismissed nor stayed, this Court and the Texas court will be on a collision course. The result would be simultaneous, duplicative actions. This presents the distinct possibility of not only inconsistent, but irreconcilable rulings.¹¹ The principles of comity mitigate strongly in favor of deference to the decision of the court of a sister state.¹² Therefore, the Court finds that E-Birchtree's legitimate interest in litigating in Delaware is outweighed by considerations of comity. The Court will not dismiss this Delaware action at this time. Instead, a stay is uniquely appropriate. Any other result would have the undesirable potential for thwarting a trial on the merits.¹³

¹¹ Assume, for example, that this Court were to rule that Enterprise's claims before it are barred by the applicable three-year Delaware statute of limitations and that, at the same time, the Texas court finds those claims to be subject to the applicable Texas four-year statute of limitations and thus ripe for determination. Doctrines of law of the case, *res judicata*, and/or collateral estoppel would combine to lead to a proverbial "train wreck."

¹² *Williams Natural Gas Co. v. BHP Petroleum Co., Inc.*, 1989 WL 122073, at *2-3 (Del. Ch.).

¹³ *Cf. Air Products and Chemicals, Inc. v. Lummus Co.*, 252 A.2d 543, 544-45 (Del. 1969) (The Delaware Supreme Court held:

[T]he convenience of the parties will be better served by a trial in Delaware, provided trial can be heard on the merits, or at least under the same limitations as would be applied if suit was brought in Puerto Rico. Indeed, Lummus objected to trial in Delaware basically because it would lose the asserted benefit of the [fifteen-year] statute of limitations.

The applicable Delaware statute of limitations was three years. The Delaware Supreme Court
(continued...)

THEREFORE, Defendants’ Motion To Dismiss, Or In The Alternative, To Stay, Pursuant to Superior Court Civil Rule 12(b)(3), is hereby **GRANTED IN PART AND DENIED IN PART**. This Delaware action is hereby stayed until final resolution of the related action pending before the District Court of Harris County, Texas, or until such further order of this Court. The parties are directed to submit a status report to the Court on or before September 3, 2007.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

¹³(...continued)
found that an injunction against instituting litigation in Puerto Rico was not warranted in light of parties’ stipulation to waive Delaware’s shorter statute of limitations. However, the Court directed that if the parties refused to enter into the stipulation “a final injunction will issue without condition,” ordering that the longer statute of limitations will apply and that the shorter Delaware statute of limitations be deemed waived.).