IN THE SUPREME COURT OF THE STATE OF DELAWARE

KIM WALTERS and ENVIRONMENTAL SOLUTIONS GROUP, INC.,	)	No. 460, 2012
Defendants-below/Appellants[1],	)	On appeal from the Court of Chancery in
v.	)	C.A. No. 4156-VCP
ENVO, INC.,	)	
Plaintiff-below/Appellee.	)	

APPELLANTS' REPLY BRIEF ON APPEAL

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[1] Defendant below Joseph Aylor voluntarily dismissed his appeal on November 1, 2012 (D.I. 13).

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ARGUMENT

I. THE COURT OF CHANCERY ERRED IN HOLDING THAT THERE WAS A BASIS FOR EQUITABLE JURISDICTION, AS MONEY DAMAGES PROVIDED A FULL, FAIR AND COMPLETE REMEDY FOR BREACH OF AN AFFIRMED AGREEMENT TO PAY MONEY FOR PURCHASED ASSETS.

In their opening brief, Appellants demonstrated that (i) the claims asserted by Envo were legal in nature, (ii) as a result of affirming the APA, Envo waived the right to seek equitable restitutionary remedies in connection with the breach, and (iii) as damages provided full, fair and complete relief, a constructive trust was unnecessary and could not form the basis for equitable jurisdiction. (Appellants' Opening Brief ("AOB") 12-21).

In its answering brief, Envo did not respond to the latter two points (effectively conceding them). As for the first point, Envo argued that the Court of Chancery determined that subject matter jurisdiction existed because Envo asserted a claim for promissory estoppel. (Envo's Answering Brief ("EAB") 16).[2]

Envo mis-characterizes the ruling of the Court of Chancery. That Court did not base its assertion of subject matter jurisdiction on the fact that Envo asserted a claim of promissory estoppel. The Court of Chancery appeared to recognize the legal

[2] Envo suggests that this Court should disregard the jurisdictional issue because the Court of Chancery determined that Envo had proven its promissory estoppel case. (EAB 20-21). However, a claim's justiciability is separate from its merits.

nature of the claims, and instead focused on the issue of whether an equitable remedy was necessary. *Envo, Inc. v. Walters*, 2009 WL 5173807 at *6-8 (Del. Ch. Dec 30, 2009).

As for promissory estoppel, Appellants, in their opening brief, noted that promissory estoppel claims are legal claims. (AOB 12, citing *Testa v. Nixon Uniform Service, Inc.*, 2008 WL 4958861 at *3 n.23 (Del. Ch. Nov. 21, 2008)).

There is also authority characterizing a promissory estoppel claim as falling within the concurrent jurisdiction of the Court of Chancery. *Mark Fox Group, Inc. v. E.I. DuPont de Nemours & Company*, 2003 WL 21524886 at *1 (Del. Ch. July 2, 2003). However, that characterization does not assist Envo.

For the Court of Chancery to be able to assert jurisdiction over such a concurrent claim, there must be no adequate remedy at law. *Id. See also Sabo v. Williams*, 303 A.2d 696, 698 (Del. Ch. 1973) ("[t]he existence of such an adequate remedy precludes this court's concurrent jurisdiction").

As this Court has noted:

> The term concurrent jurisdiction as applicable to Equity and law does not mean that the jurisdiction is an alternative and equal jurisdiction really concurrent with the Courts of both law and Equity, and available in either at discretion. In such case the rule, heretofore designated as an invariable rule of equity, would have no force. The term does mean that jurisdiction over legal rights ordinarily cognizable in a court of law may be entertained in a Court of Equity, concurrently with the

> law Court, where the remedy of the law court is, for some reason, imperfect or inadequate. So it is that Pomeroy (Sec. 139) says:
>
> > "The fact that the legal remedy is not full, adequate and complete is, therefore, the real foundation of this concurrent branch of the Equity jurisdiction."

Glanding v. Industrial Trust Co., 45 A.2d 553, 566 (Del. 1945). *See also* 1 John N. Pomeroy, *Equity Jurisprudence* §178 at 247 (5th Ed. 1941)("[e]ven when the cause of action...does involve some particular feature...over which the concurrent jurisdiction normally extends..., if the legal remedy by action and pecuniary judgment for debt or damages would be complete, sufficient and certain - that is, would do full justice to the litigant parties - in the particular case, the concurrent jurisdiction of equity does not extend to such case").

Thus, concurrent equitable jurisdiction over a claim of promissory estoppel still depends on the absence of an adequate remedy at law. As noted above, Envo did not make any effort to explain why damages are not an adequate remedy, why a constructive trust is necessary (or permissible in light of Envo's affirmance of the APA), and why legal execution process (*see* 10 *Del. C.* ch. 49) would not be sufficient to enforce any monetary judgment. There was no basis for the imposition of a constructive trust or the assertion of subject matter jurisdiction.

II. ENVO'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

In their opening brief, Appellants demonstrated that (i) as Envo's claims and true relief sought were legal in nature, the three-year Statute of Limitations, 10 *Del. C.* §8106(a), (and not the doctrine of laches) applied; (ii) the injury was known (and hence the cause of action accrued) at the time of breach of the APA, *i.e.*, non-payment, which occurred more than three years before suit was filed; (iii) the six-year limitations period for promissory notes, 10 *Del. C.* §8109, does not apply to "implied" (unwritten) promissory notes; (iv) a claim of fraudulent misrepresentation tolling the Statute of Limitations cannot be based on the same conduct giving rise to the cause of action for fraud; and (v) settlement negotiations did not toll the Statute of Limitations. (AOB 22-31).

Envo argues in response that (i) laches, and not the Statute of Limitations, controls; (ii) the limitations period was tolled pursuant to the doctrine of inherently unknowable injuries; and (iii) the six-year limitations period for promissory notes, 10 *Del. C.* §8109, applies. (EAB 22-28).

As demonstrated below, Envo's conclusory arguments, with no citation to any authority or any reasoned analysis, are wrong.

A. THE DOCTRINE OF LACHES DOES NOT APPLY TO LEGAL CLAIMS WITHIN THE COURT'S CONCURRENT JURISDICTION.

Envo asserts that the equitable doctrine of laches controls the analysis. (EAB 22-23). This is incorrect.

Laches does not apply to legal claims. *See In re Estate of Cornelius*, 2002 WL 1732374 at *2 (Del. Ch. Jul 11, 2002) ("[i]f the claims are legal, the statute of limitations would be applied without any reference to laches...").

Similarly, the Statute of Limitations, and not laches, applies in circumstances where the Court of Chancery has concurrent jurisdiction. *Bovay v. H.M. Byllesby & Co.*, 38 A.2d 808, 814 (Del. 1944) (noting the rule that courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases). *See also Whittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 9 (Del. 2009).

B. ON THE MOTION TO DISMISS.

1. Contract Claims.

As noted in Appellants' opening brief, Appellants are not parties to the promissory notes. The Court of Chancery rejected Envo's efforts to reform the APA to name Mr. Walters as a party to the APA and the promissory notes (which ruling Envo did not appeal), and Envo never sought to reform the APA and the promissory notes to name ESGI as a party. As such, neither Mr. Walters nor

ESGI are parties to any written promissory note, and so any claim to collect a debt falls under the express language of 10 *Del. C.* §8106, which applies a three-year limitations period to debts "not evidenced by a record or by an instrument under seal...."

Notwithstanding this language, the Court of Chancery held that the six-year limitations period of Section 8109 applied because there was an "implied" promissory note. By definition, something implied is not "evidenced by a record," and so Section 8106(a), and not Section 8109, is the proper statute.

Envo offers no authority contradicting the precedent cited by Appellants, and does not offer any reason why this Court should ignore the express language of Section 8106. Further, Envo does not respond to Appellants' authority holding that, since the promissory notes were part of the APA, any defense to the APA (including the Statute of Limitations) covers the promissory notes as well. (AOB 26-28).

2. <u>Tort Claims.</u>

In their opening brief, Appellants demonstrated that the Statute of Limitations was not tolled on the claimed ground of fraudulent misrepresentation, because the alleged misrepresentation that formed the basis for the fraud claim may not be bootstrapped into a basis for tolling the Statute of Limitations. Any tolling

must be based on an independent misrepresentation made for the purpose of concealing the prior tort. (AOB 28).

Envo did not respond to this argument, and so appears to concede the point.

C. POST-TRIAL DECISION.

As noted in Appellants' opening brief, the "inherently unknowable injury" or "time of discovery" rule relied on by the Court of Chancery to toll the Statute of Limitations does not properly apply to a breach of contract to pay money, as the injury is made manifest by the failure to receive the money. Further, negotiations to settle a dispute do not toll the Statute of Limitations. (AOB 29-30).

Envo again does not respond to the arguments and authorities, or offer any counter-authorities. Instead it simply points to the decision of the Court of Chancery and asks this Court to affirm it.

Envo notes that the Court of Chancery found that "the nonpayment of the $10,000 at Closing did not signal to Kollias a breach of, or even Defendants' intent to breach the APA...." (EAB 25). Yet Envo does not point to anything that was said or done to reassure it that the money was forthcoming. Nor does Envo explain what signal was sent when the money did not arrive the next day, or the next, or the next. The law requires a breach for the cause of

action to accrue. It does not also require a communication of intent to breach[3], and Envo does not cite any authority so holding.

Envo had the legal right to money at Closing. The failure to pay was a known breach, intentional or otherwise. Envo could have brought suit at any time thereafter to collect. If Envo chose to defer legal action for some reason, that was at Envo's risk, particularly if Envo made no effort to find out why it had not received payment.

Envo also points to the settlement negotiations (EAB 25), but does not respond to the arguments and Delaware authorities presented in Appellants' opening brief (AOB 29-31) or provide any counter-authorities. As demonstrated in Appellants' opening brief, the Statute of Limitations is not tolled by settlement discussions.

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[3] After all, an unintentional breach is still a breach giving rise to legal rights and remedies. *See Agron v. Trustees of Columbia University in City of New York*, 1993 WL 118495 at *4 (S.D.N.Y. Apr 12, 1993) ("[i]ntent, however, is not required for breach of contract. Even if unintentional, Columbia's breach triggered the statute of limitations") (footnote omitted).

III. THE COURT OF CHANCERY ERRED IN ASSESSING PERSONAL LIABILITY WHEN IT WAS THE UNDERSTANDING OF THE PARTIES THAT THERE WOULD BE ONLY CORPORATE LIABILITY FOR THE DEBT.

In their opening brief, Appellants demonstrated that the undisputed evidence is that Mr. Walters and Mr. Aylor, relying on their lawyer, made a good faith effort to incorporate, only to learn after the fact that the effort failed due to the corporate name having been taken. Upon discovery of this fact, and with Mr. Kollias' knowledge, counsel for Mr. Walters and Mr. Aylor formed ESG, which assumed the business assets and operations. It is also undisputed that Envo sought, but abandoned, any effort to obtain personal guarantees from Mr. Walters and Mr. Aylor. (AOB 32-33).

Appellants also pointed out that the law provides that when a party contracts with an imperfectly organized corporation, he is estopped to deny its corporate existence and is precluded from recovering from its members individually as if they were partners. (*Id.*).

Envo, in its answering brief, attempts to distinguish the authorities cited by Appellants on their facts. Envo, however, does not explain why any claimed factual distinctions matter or render the legal principle inapplicable in this case.

Envo argues that Appellants did not have a de facto corporation because there was no exercise of corporate power in that Mr. Walters did not create bylaws, minutes of annual meetings,

corporate resolutions, etc. (EAB 33). These, however, are not the exclusive indicia of the exercise of corporate powers. *See Cantor v. Sunshine Greenery, Inc.*, 398 A.2d 571, 573 (N.J. Super. A.D. 1979) ("[t]he mere fact that there were no formal meetings or resolutions or issuance of stock is not determinative of the legal or De facto existence of the corporate entity....The act of executing the certificate of incorporation, the Bona fide effort to file it and the dealings with plaintiffs in the name of that corporation fully satisfy the requisite proof of the existence of a De facto corporation"); *Matter of Whatley*, 874 F.2d 997, 1000-1001 (5th Cir. 1989) (de facto corporation found despite failure to hold organizational meeting, adopt bylaws or hold director or shareholder meetings where there were corporate officers and they conducted business).

Mr. Walters and Mr. Aylor made a bona fide effort to utilize the procedures of the Delaware General Corporation Law and the Division of Corporations to incorporate, and thereafter exercised corporate power by entering into the APA and operating the business. Thus, the requirements identified in Envo's brief (EAB 30) were met. Mr. Kollias was advised of the problem, and made no objection. As such, he should not be permitted to complain now, or seek greater relief than that for which he bargained, *i.e.*, corporate, and not personal, liability.

CONCLUSION

WHEREFORE, for the foregoing reasons, as well as the reasons stated in their opening brief, defendants-below/appellants respectfully request that this Court reverse the decision of the trial court, and dismiss this action for lack of subject matter jurisdiction, and, for reasons of judicial efficiency, make such dismissal with prejudice on the ground that the claims are barred by the Statute of Limitations.

Respectfully submitted,

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