SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5055-15T1

RONALD B. BRUDER and BROOKHILL CAPITAL RESOURCES, INC.,

Plaintiffs-Appellants,

v.

DAVID H. HILLMAN, SMC-VIENNA PARK G.P., INC., VIENNA PARK, L.L.C., SOUTHERN MANAGEMENT CORPORATION,

Defendants-Respondents,

and

THE GALLOWS CORPORATION,

Defendant.

Argued June 6, 2017 – Decided June 27, 2017

Before Judges Yannotti, Fasciale and Gilson.

On appeal from Superior Court of New Jersey, Chancery Division, Passaic County, Docket No. C-55-13.

Elisabeth S. Theodore (Arnold & Porter Kaye Scholer, L.L.P.) of the Maryland and District of Columbia bars, admitted pro hac vice, argued the cause for appellants (Sandelands Eyet, L.L.P., and Ms. Theodore, attorneys;

William C. Sandelands and Kathleen Cavanaugh, of counsel and on the briefs; Ms. Theodore and David Bergman (Arnold & Porter Kaye Scholer, L.L.P.) of the District of Columbia bar, admitted pro hac vice, on the briefs).

Alexander G. Benisatto argued the cause for respondents (Shapiro, Croland, Reiser, Apfel & Di Iorio, L.L.P., attorneys; Mr. Benisatto, on the brief).

PER CURIAM

Ronald B. Bruder (Bruder) and Brookhill Capital Resources, Inc. (Brookhill) (plaintiffs) appeal from a June 10, 2016 order granting summary judgment to David H. Hillman (Hillman), SMC-Vienna Park G.P., Inc. (SMC), Vienna Park, L.L.C. (VPLLC) and Southern Management Corporation (Southern) (defendants). That order dismissed the complaint with prejudice. Plaintiffs also appeal from a June 10, 2016 order denying their motion for partial summary judgment.

We affirm the order denying plaintiffs' motion for partial summary judgment. We affirm the order granting summary judgment to defendants as to Count One of the complaint. We reverse, remand, and direct the judge to conduct further proceedings as to Counts Two and Three of plaintiffs' complaint, requesting access to books and records and an accounting.

In 1984, plaintiffs formed a New Jersey limited partnership, Vienna Park, L.P. (VP). Plaintiffs, who are sophisticated real

estate investors, served as general partners in VP. VP's express purpose was to own and operate apartment buildings, specifically a 300-unit complex in Virginia (the property). The property was mismanaged and VP filed for bankruptcy.

In 1992, the bankruptcy case settled. As part of that settlement, VP negotiated an agreement with Hillman to take control of VP, invest capital into VP, restructure VP's secured debt, and to provide capital for continued debt service. Pursuant to the bankruptcy court's order, Hillman purchased secured notes and deeds of trust on the Property through the bankruptcy case for $11,850,000.

In 1993, VP emerged from bankruptcy under an amended partnership agreement (the Agreement) with Hillman. The Agreement converted plaintiffs' general partnership interests into limited partnership interests, and substituted Hillman or "any corporation or partnership owned or controlled by [Hillman]" as the general partner. VP remained a New Jersey limited partnership, and Hillman substituted SMC, a company he owned, as the general partner, and designated Southern, another Hillman-owned entity, as the manager of VP.

In 2007, Hillman, through Southern and SMC, directed that VP be converted into VPLLC as part of an overall strategy to refinance loans. Hillman undertook the conversion to satisfy certain

requirements imposed by the lender, Freddie Mac, and to obtain refinancing. Hillman executed a new operating agreement (the OA) for VPLLC, transferring management to another of Hillman's entities, The Gallows Corporation (Gallows).[1] The OA stated that the general and limited partners of VP "agreed to enter into this [OA] to regulate the affairs of [VPLLC], the conduct of its business, and the relations of its [m]embers."

Plaintiffs alleged that they did not learn of the conversion until 2012, and promptly requested to review certain records and books, which Hillman denied. In 2013, plaintiffs filed this complaint to unwind the conversion and review the books and records of VPLLC. The complaint contains three counts requesting: declaratory judgment that defendant dissolved the partnership unlawfully and in violation of the partnership agreement, the dissolution of VP is void, and the partnership agreement remained valid and effective (Count One); access to books and records (Count Two); and seeking an accounting of all disbursements and investments of VP and VPLLC (Count Three).

Plaintiffs maintained that the conversion was not only illegal because they were uninformed, but that the OA significantly

[1] We previously affirmed an order dismissing the complaint against Gallows for lack of personal jurisdiction. Bruder v. Hillman, No. A-3112-13 (App. Div. June 12, 2015).

altered their rights including exculpating VPLLC's manager from liability, creating new membership classes, and increasing fees paid to the management company. They alleged that the conversion amounted to an unlawful dissolution of VP.

The parties cross-moved for summary judgment. The judge granted defendants' motion as to Count One of the complaint concluding that Hillman properly converted VP to VPLLC, plaintiffs received notice of the conversion, and the statute of limitations and doctrine of laches barred the complaint. The judge did not address Counts Two and Three of the complaint in which plaintiffs requested various books, records, and an accounting of all disbursements and investments of VP and VPLLC. The judge denied plaintiffs' cross-motion for summary judgment finding that they did not object to the conversion.

On appeal, plaintiffs argue that defendants dissolved the partnership, rather than properly converting VP into VPLLC; laches does not bar the complaint; and outstanding discovery precluded the issuance of summary judgment to defendants.

When reviewing an order granting summary judgment, we apply "the same standard governing the trial court." Oyola v. Liu, 431 N.J. Super. 493, 497 (App. Div.), certif. denied, 216 N.J. 86 (2013). We owe no deference to the motion judge's conclusions on

issues of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

We agree with the judge that the doctrine of laches bars plaintiffs' complaint. "Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417 (2012) (quoting County of Morris v. Fauver, 153 N.J. 80, 105 (1998)). Laches is an equitable remedy that our Supreme Court has found to be "an equitable defense that may be interposed in the absence of the statute of limitations." Id. at 418 (quoting Borough of Princeton v. Bd. of Chosen Freeholders, 169 N.J. 135, 157 (2001)).

The Court has explained, laches is "invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party." Ibid. (quoting Knorr v. Smeal, 178 N.J. 169, 180-81 (2003)). "Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned." Knorr, supra, 178 N.J. at 181. "Our courts have long recognized that laches is not governed by fixed time limits, but instead relies on analysis of

time constraints that 'are characteristically flexible[.]'" Fox, supra, 210 N.J. at 418 (citation omitted) (quoting Lavin v. Bd. of Educ., 90 N.J. 145, 151 (1982)). Whether laches applies "depends upon the facts of the particular case and is a matter within the sound discretion of the trial court." Mancini v. Township of Teaneck, 179 N.J. 425, 436 (2004) (quoting Garrett v. Gen. Motors Corp., 844 F.2d 559, 562 (8th Cir.), cert. denied, 488 U.S. 908, 109 S. Ct. 259, 102 L. Ed. 2d 248 (1988)).

In determining whether to apply laches, the court should consider the length of the delay, the reasons for the delay, and any changing circumstances of the parties during the delay. County of Morris, supra, 153 N.J. at 105. As to the delay, the court should look to an analogous statute of limitations, and laches applies where "a claim derived from a statutory right had been lost through failure to make a timely demand therefor." Fox, supra, 210 N.J. at 420 (citing Lavin, supra, 90 N.J. at 152).

In concluding that the doctrine of laches barred plaintiffs' complaint, the judge followed these well-settled principles. The judge found the undisputed motion record demonstrated that

> (1) [p]laintiff[s] ha[ve] not paid significant attention to [VP or VPLLC] since 2003; (2) [they] received K-1's since 2008[,] and whether they were simply received and passed along to [plaintiffs'] accountant or reviewed by the [p]laintiffs and their accountants, the [K-1's] were reflected on their signed tax

> returns; (3) [p]laintiff[s] received distributions [from VPLLC]; and (4) [p]laintiff[s] had full access to the electronic portal for any and all information so that they would become aware of any and all activities of the entity. It was not [d]efendant Hillman's responsibility or duty to "spoon-feed" a sophisticated, passive investor. Plaintiffs had significant responsibility to oversee their own investment and be aware of the actions that were being taken.

It is undisputed that the K-1's as of 2008 had the name VPLLC on them, and plaintiffs filed the K-1's with their tax returns. The judge also noted that had plaintiffs accessed the portal, they would have learned of the conversion and all relevant documentation associated with the Freddie Mac refinance.

Moreover, plaintiffs could have learned of the conversion if they had read any of the documents provided to them by defendants. For example, on December 7, 2006, Southern mailed Hillman's conversion notice to all the partners that owned multi-family properties managed by Southern. The notice advised plaintiffs that Southern intended to convert the partnerships into limited liability companies, and stated:

> Under the terms of the existing partnership agreements, I am fully authorized on behalf of the partnership and all individual partners to undertake all action deemed necessary for the benefit of the entities (and partners). Provided there are no written objections to the conversion of the existing partnership to Limited Liability Company, I will undertake

> to accomplish the conversion prior to February 2007.

Southern attached a list of multiple properties if a partner was invested in more than one property. Plaintiffs invested in only one property, and therefore Southern did not attach that list to their notice. The judge properly found that a presumption of mailing and receipt existed, and plaintiffs were deemed to have received this notice.

Now, over six years after the fact, plaintiffs have shown considerable delay in filing their claim, and therefore the record shows inexcusable and unexplainable delay. The record shows that plaintiffs had sufficient knowledge of their rights, as established by the presumption of mailing and other documents plaintiffs received concerning the conversion. Therefore, plaintiffs, who are sophisticated investors, had sufficient opportunity to assert their rights.

Timeliness aside, plaintiffs' inexcusable delay in objecting to the conversion has prejudiced defendants. Prejudice would result from complications in refinancing and by witness memories fading. Since the 2007 Freddie Mac refinancing, VPLLC has refinanced twice, and the terms of its most current loan could imperil the loan if we reverse. The loan terms state that VPLLC "will not take any action . . . to change its legal structure[.]"

The loan further notes that failure to comply with this requirement will constitute an event of default for VPLLC. According to defendants, a default on the loan "could have [a] catastrophic impact across the entire loan portfolio[.]" The passage of six years since the conversion presents significant practical problems as "documents may no longer be available" and parties' memories may have faded.

We therefore conclude that the judge did not err by relying on the doctrine of laches to grant summary judgment to defendants on Count One. Accordingly, we need not reach the question of whether the statute of limitations barred the complaint or if the purported dissolution of the partnership occurred or was unlawful.

We remand for the court to consider Counts Two and Three because the judge did not address these arguments. The court's ruling on laches pertained to the challenge to the conversion. On remand, the trial court should address the claims in Counts Two and Three.

We conclude that plaintiffs' remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part, and reversed and remanded in part. We do not retain jurisdiction.