Laches Decision Reversed 'in the Interest of Justice'

By Barry M. Klayman and Mark E. Felger

Delaware Business Court Insider September 11, 2013


Barry M. Klayman Mark E. Felger

It is not often that the Delaware Supreme Court rejects the specific arguments advanced by an appellant and then decides the matter in the party's favor on grounds not asserted by that party but considered sua sponte by the court. Such was the case in *Levey v. Brownstone Asset Management*, LP, No. 551, 2012 (Del. Aug. 27, 2013), wherein the court reversed the decision of the Court of Chancery and remanded for further proceedings "in the interest of justice."

Gordon Scott Levey appealed from the Court of Chancery's order granting summary judgment and dismissing his action on the ground of laches by analogy to the statute of limitations. According to the Supreme Court's opinion, the facts were undisputed, although at oral argument Levey's attorney argued that there was a material issue of fact that should have precluded summary judgment. Levey had been a member of Brownstone Investment Group (BIG) for many years. In 2004, he became a minority non-managing owner of two related entities, Brownstone Investment Partners (BIP) and Brownstone Asset Management (BAM). In 2006, he announced that he was leaving all three. Litigation ensued immediately in federal court, in which Levey, by way of counterclaim, asserted entitlement to the return of his capital investments in BIP and BAM, plus a cash payment in connection with his voluntary departure from BIG. A year later, in 2007, Levey's attorney formally demanded payment of the value of his claimed interests in the Brownstone entities or else he would pursue available legal remedies. In response, the defendants took the position that Levey no longer had any legal interests in BIP and BAM, nor had he any basis to believe that he still held such interests.

Levey moved to stay the litigation and to compel the defendants to submit to arbitration before the National Association of Securities Dealers (NASD). The federal court agreed with Levey and held that the defendants were subject to mandatory arbitration. Levey filed a formal demand for arbitration before the Financial Industry Regulatory Authority (FINRA), the successor to NASD, alleging he was entitled to the return of his BIG capital account and any capital amounts held in his name by either BIP or BAM. However, in June 2008, the FINRA arbitration panel held that the matter was not arbitrable and advised Levey to pursue his claims elsewhere. Levey waited another two years before commencing his lawsuit in the Court of Chancery.

The Court of Chancery granted summary judgment to the defendants, holding that Levey knew as of the date of his demand letter in 2007 that he had a legal claim against the defendants, yet did not pursue it during the three-year analogous period of limitations. The Court of Chancery also opined that Levey had a "reasonably conceivable" claim to his ownership stake in BIP and BAM, or alternatively to their cash values, and that he had been treated unjustly. However, based on the undisputed facts of record, the court believed that it was obligated to apply laches and granted summary judgment to the defendants.

At oral argument on appeal, Levey's counsel argued that summary judgment should not have been granted because there were disputed issues of fact. He argued that the defendants' mere denial of Levey's property rights were insufficient to put him on notice that he had to bring an action to vindicate those rights. He also argued that the letter rejecting the 2007 demand from Levey's counsel was not a clear rejection of his rights but a request for additional information, creating a triable issue of fact.

Based on the questions from the bench, the justices were skeptical of these arguments and in fact they are not mentioned at all in the court's opinion. Instead, the court wrote that Levey conceded that he commenced his action after the expiration of the analogous three-year statute of limitations period, but argued that his delay should be excused because his former counsel erred in not pursuing his claim more timely and the statute should be tolled because of self-dealing on the part of the defendants. The court rejected both arguments without extensive discussion.

However, the court then went on to discuss two arguments that had not been made by Levey but were disclosed by the court's independent review of the record. Based on those arguments, the court reversed and remanded the case to the Court of Chancery so that Levey could try his claims on the merits.

The court, citing its decision in *IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174 (Del. 2011), which neither side had raised, found that there were "unusual conditions or extraordinary circumstances" that justified not applying the statute of limitations by analogy in determining whether Levey's delay in filing suit was unreasonable. The court considered the five factors delineated in the *IAC* case: (1) whether the plaintiff had been pursuing his claim, through litigation or otherwise, before the statute of limitations expired; (2) whether the delay in filing suit was attributable to a material and unforeseeable change in the parties' personal or financial circumstances; (3) whether the delay in filing suit was attributable to a legal determination in another jurisdiction; (4) the extent to which the defendant was aware of, or participated in, any prior proceedings; and (5) whether at the time the litigation was filed, there was a bona fide dispute as to the validity of the claim. The court concluded that four of the five factors supported a finding that there were "unusual conditions and extraordinary circumstances" that suggested that Levey's case presented the rare case where the analogous statute of limitations ought not to be the measure of whether he unreasonably delayed in commencing his action. Key to the court's finding was the fact that Levey had asserted his claims in the subsequently-dismissed federal action, that the defendants were aware of and participated in those prior proceedings, and that the delay in filing suit in Delaware was attributable, in part, to the defendants having sued Levey in federal court and that court's mandatory arbitration ruling and FINRA's "surprising" disclaimer of jurisdiction over the case.

The court found a second, alternative reason why the Court of Chancery should be reversed. The running of the analogous statute of limitations, even if applicable, should have been equitably tolled during the pendency of the federal court action and that court's consideration of Levey's motion to compel arbitration, and the later FINRA proceeding. Levey's assertion of his claims in those proceedings occurred within the three-year limitations period. By virtue of the tolling, Levey's Delaware action would have been timely under the analogous three-year limitations period.

After developing these arguments sua sponte, the court addressed whether they had been waived by not being raised by Levey or should be considered "in the interests of justice." The court noted that the Court of Chancery itself believed that the outcome was unjust, a proposition with which it clearly agreed, and had the *IAC* and tolling arguments been made, the court believed that the Court of Chancery would not have granted summary judgment to the defendants.

Why did the court offer Levey a lifeline? The opinion suggests several reasons. First, the court was obviously affected by the Court of Chancery's statement that Levey had been ill-treated and that the dismissal of his claims without an opportunity to try them on the merits was unjust, even if dictated by the parties' arguments. Second, the court's characterization of the prior proceedings in the federal court and before FINRA suggests that FINRA's rejection of jurisdiction troubled the court. Finally, although it rejected Levey's argument that his delay in bringing suit should be excused because his former counsel erred in not timely filing suit, the court may have been sensitive to exposing counsel to a malpractice claim as had been suggested by defendants' counsel in oral argument.

The court's opinion contains sufficient caveats about the uniqueness of the case and the unusual circumstances it presented to suggest that the court will not be quick to invoke the "interests of justice" to excuse a party's failure to advance compelling arguments in support of its position. Nevertheless, the opinion represents quintessential Delaware jurisprudence because of its emphasis on the importance of a just, as well as a correct, result.

Barry M. Klayman *is a member in the commercial litigation group and the bankruptcy, insolvency and restructuring practice group at Cozen O'Connor. He regularly appears in Chancery Court.*

Mark E. Felger *is co-chair of the bankruptcy, insolvency and restructuring practice group at the firm.*